85-718

No.

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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AMERICAN METHYL CORPORATION,
PETITIONER

v.

THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHRYSLER CORPORATION, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND ENVIRONMENTAL PROTECTION AGENCY

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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29pp

## QUESTION PRESENTED

Once a fuel or fuel additive has been waived into commerce, can its waiver be revoked and the fuel be excluded from commerce without first proceeding as required by § 211(c) of the Clean Air Act for the regulation and control of fuels in commerce?

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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American Methyl Corporation (intervenor below)[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

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[1] American Methyl Corporation was formerly known as Anafuel Unlimited and is so referred to in the decision of the administrator of the Environmental Protection Agency.

## OPINIONS BELOW

The opinion of the Court of Appeals (per Judge Wald) is reported at 768 F.2d 385, and appears as Appendix A. The decision of the administrator of the Environmental Protection Agency (EPA) was published at 46 Fed. Reg. 48975 (Oct. 5, 1981), and appears as Appendix C. Subsequent orders of the Court of Appeals denying a petition for rehearing and a suggestion that rehearing be en banc, entered September 18, 1985, are unreported, and appear as Appendices D and E.

## JURISDICTION

The judgment of the Court of Appeals (App. B, infra) was entered on July 26, 1985. A timely petition for rehearing was denied on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The applicable statutory provisions are set forth in full in Appendix G, p. 58a. The pertinent parts of said statutes provide as follows:

Section 211(c)(1) of the Clean Air Act, 42 U.S.C. § 7545(c)(1) provides (Appendix G, p. 59a):

> (1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the

Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

Section 211(f)(4) of the Clean Air Act, 42 U.S.C. § 7545(f)(4) provides (Appendix G, p. 64a):

> (4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this subsection or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 7525 of this title. If the Administrator has not acted to grant or deny an application under this

paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted.

## STATEMENT

1. Before the 1977 amendments to the Clean Air Act, the EPA was authorized by regulation under § 211 (c)(1)[2] to control or prohibit the sale of a fuel or fuel additive already introduced into commerce if it was found to significantly impair emission control devices or systems.

The 1977 amendments to the Clean Air Act included new § 211(f) (Appendix, p. 63a) designed to prohibit the introduction of any new fuels or fuel additives other than those substantially similar to fuels used by manufacturers in certification testing of new vehicles under § 206 of the Act. Behind the enactment of § 211(f) was the concern of Congress that some new fuels, particularly one known as MMT, would reduce the effectiveness of existing emission control devices in cars and light-duty trucks before the EPA would be able to complete

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[2] 42 U.S.C. § 7545(c)(1). (Appendix, p. 59a.)

the administrative proceedings under § 211(c). See American Methyl Corp. v. E.P.A., 749 F.2d 826, 829 (D.C. Cir. 1984).

At the same time Congress wanted to avoid delaying unnecessarily the admission into commerce of new fuels that did not cause or contribute to the failure of vehicles to meet emission standards. To avoid unnecessary delays for introduction into commerce of such fuels, Congress added a new § 211(f)(4) pursuant to which new fuels would be automatically waived into commerce if the Administrator does not act to grant or deny a waiver application within 180 days of its receipt.

An example of a new fuel is methanol (methyl/alcohol) which is considered by many experts to be the most promising transportation fuel of the future. One of the chief advantages of this fuel is that it can be produced very efficiently from a wide range of domestic feedstocks including natural gas, refuse and coal. Methanol's chief current market is as a gasoline extender and octane enhancer. When used in place of petroleum-derived octane boosters, which are more expensive, more gasoline can be generated from a barrel of oil.

Petitioner, American Methyl Corporation, was one of the first companies to recognize the potential of methanol-gasoline blends. On February 20, 1981, American Methyl applied under § 211(f)(4) of the Clean Air Act for a waiver, which was granted September 28, 1981, for a fuel additive known as Petrocoal. American Methyl's expenditures in developing and marketing Petrocoal totaled nearly one million dollars. American Methyl Corp. v. E.P.A., supra, 749 F.2d at p. 829, fn. 13.

3. Shortly after the granting of the Petrocoal waiver, two attempts were made by the Motor Vehicle Manufacturers Association (MVMA), one unsuccessful and the other successful, to have Petrocoal eliminated from commerce. This petition stems from the conflicting treatment of those attempts by two different panels of the Court of Appeals for the District of Columbia Circuit.

The unsuccessful attempt to end the Petrocoal waiver was an MVMA effort to have the waiver revoked under § 211(f) of the Act. After the proceedings in the EPA, the Administrator proposed to revoke the Petrocoal waiver claiming an inherent power of revocation

under § 211(f) of the Act. American Methyl Corp. v. E.P.A., supra, 749 F.2d at pp. 829-830. American Methyl petitioned the Court of Appeals for review of the proposed revocation claiming that the Petrocoal sales which had been at a record high level before the EPA threatened to revoke the waiver, had virtually ceased within a matter of months. The loss of sales was attributed by American Methyl's president to the EPA's assertion of a right to revoke the waiver under § 211(f).

The Administrator took the position, among others, that he had inherent authority under § 211(f) to revoke the waiver of fuels already introduced into commerce but the Court of Appeals held otherwise in the light of (1) Congress' insistence that the EPA make a "careful albeit expeditious decision in the first instance" of waiving a fuel into commerce under § 211(f) and (2) the "Congressionally-mandated procedural safeguards" of § 211(c) for correcting mistakes once a fuel has been admitted into commerce under § 211(f).

Before the Administrator may "control or prohibit" under § 211(c) a fuel or fuel additive already introduced into commerce, he must, among other things, (1)

consider all pertinent scientific, medical, or economic data; (2) prepare a cost/benefit analysis (for regulation protecting emission controls); (3) formally declare that the fuel or fuel additive causes or contributes to harmful air pollution or would significantly impair the effective functioning of emission control systems; and (4) formally declare that regulation would not result in use of more dangerous additives. No such protections are found in § 211(f).

The Court of Appeals set aside the notice proposing revocation of the Petrocoal waiver after finding that "implied power to revoke waivers under § 211(f) of the Clean Air Act [was] contrary to the intention of Congress and the design of that statute * * *." American Methyl Corp. v. E.P.A., supra, 749 F.2d at p. 840.

The serious harm to the country from the existence of power to revoke existing waivers of fuel already in commerce without § 211(c) proceedings was described by the Court of Appeals in the following language (749 F.2d at 840):

Like the sword suspended by a hair above the

courtier Damocles, the Administrator's claimed revocation authority would pose an ever-present threat to the marketing of new fuels, fostering great uncertainty in the business community. Technologically-advanced fuels could be taken off the market at any time, and neither specified hearing procedures nor rules of repose would cabin the Administrator's discretion. This risk is hardly typical of commercial operations in a regulated economy. Moreover, because the manufacturer's product is assumed undeserving of waiver, the presumption is against the continued existence of his business even if his waiver is challenged with evidence gathered years after heavy capital investment—an extraordinary risk for a commercial entity to bear, as agency counsel conceded at oral argument.

Because a manufacturer could never know ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment, he might well decide not to risk his capital in the first place. As a consequence, the public and this nation would suffer from lack of innovation in fuels and fuel

additives, to the ultimate detriment of air quality and our national security.

The American Methyl Corp. v. E.P.A. case was remanded to EPA for proceedings under § 211(c).

Before any of the proceedings required by § 211(c) had been conducted, MVMA's second effort to revoke the Petrocoal waiver—direct review of the original granting of the waiver by the Court of Appeals—came before another panel of the Court. The second panel, without the benefit of any proceedings having been conducted under § 211(c), proceeded to find that the Administrator's granting of the Petrocoal waiver was arbitrary, capricious and an abuse of discretion and vacated the waiver. The case was remanded for further proceedings for the possible grant of a new waiver for Petrocoal. It is from this second action of the Court of Appeals that this petition stems.

## REASONS FOR GRANTING THE PETITION

1. THE DECISION BELOW WOULD READ OUT OF THE STATUTE THE SPECIFIC PROCEDURES SPECIFIED BY CONGRESS TO BE FOLLOWED FOR THE CONTROL OF FUELS ALREADY IN COMMERCE.

The decision of the Circuit Court, if permitted to stand, will remove all the substantive and procedural safeguards expressly provided by Congress in § 211(c) for the protection of the public and the manufacturers and sellers of fuel or fuel additives already introduced into commerce.

Congress provided a procedure to be followed by the EPA Administrator to waive the prohibitions which Congress had established making it "unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce" such fuel or fuel additive. Section 211(f)(4) of the Clean Air Act, 42 U.S.C. 7545(f)(4) grants the Administrator the right to waive the said prohibition against introducing certain fuels into commerce. In addition, said § 211(f)(4) provides that if no action is taken by the Administrator to grant or deny an application then the waiver made possible by said § 211 (f)(4) "shall be treated as granted."

In its wisdom, Congress did not exclude "waived" fuels from the already existing procedures to be followed for fuels already set forth in § 211(c) of the Clean Air Act, 42 U.S.C. 7545(c).

The procedures to control or prohibit such offending fuels are detailed and were intended by Congress to be followed to protect both the public and the manufacturers who had devoted substantial resources to producing the fuel or fuel additives pursuant to a waiver. The Senate Committee Report on the Clean Air Amendments of 1977 (p. 91) states (S.Rep. No. 127, 95th Cong., 1st Sess. 91 (1977) reprinted in 3 Legislative History, supra note 8, at 1371, 1465:

> "The Committee was mindful that the Administrator could choose not to act on the waiver application within the 180 days provided for such action. If the Administrator does fail to act under subsection (d) [now subsection (f)] to either grant, conditionally grant, or deny the waiver, it does not diminish the Administrator's power to act against the fuel or fuel additive through the application of the provisions of subsection (c) of this section.

The Court below determined that the actions of the Administrator were arbitrary, capricious and an abuse of discretion and then vacated the Administrator's decision and remanded the matter to the EPA to make a reasoned

decision as to whether to grant the waiver. There is no authority in the statute for such action for fuels already in commerce. If there was a mistake made authorizing a fuel to be introduced into commerce, then the matter must be remanded to the Agency for determination pursuant to § 211(c) which deals specifically with this very problem. Section 211(c) is a part of the Congressional Act and the Court below had no right to interpose its own procedure in preference to that specified by Congress. As this Court said in Chevron, U.S.A., Inc. v. Natural Resources Defense, 104 S.Ct. 2778, 2783 (1984):

> * * * If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress * * *.

2. THE PROCEDURE FOLLOWED BY THE COURT BELOW IN REVIEWING AN ADMINISTRATION DECISION CONFLICTS WITH THE PROCEDURES RECENTLY REITERATED AND DETAILED BY THIS COURT.

This Court in Motor Vehicle Mfrs. Ass'n v. State

Farm Mut., ____ U.S. ____, 103 S.Ct. 2856, 2870 (1983) reaffirmed its holding in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197 (1978) as follows:

> * * * In Vermont Yankee, we held that a court may not impose additional procedural requirements upon an agency.

and also at p. 2871 said:

> * * * The agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made."* * *

The second panel of the Court of Appeals found a statement in an Appendix to the Petrocoal Waiver granted by the EPA which discusses a "statistical deteriorated Emissions Test" utilized by the EPA (46 Fed. Reg. at 48,978, 48,979, Appendix C, pp. 53a, 54a). The Administrator states that "Petrocoal just fails (by one vehicle) this Test for $NO_2$." The panel then concludes that the EPA has established specific statistical criteria for determining whether a fuel will cause a vehicle to exceed emission standards.

In fact, the EPA does not have any specific standards or procedures established for review of such waivers. The EPA has several tests which it employs in accordance with the authority granted the EPA by Congress to determine whether or not to waive the prohibitions against introduction of any fuel or fuel additive into commerce. It is assumed that the EPA has not established nor published any specific standards or procedures because of the various methods which may be used. As the Administrator said in its grant of the Petrocoal Waiver (Appendix C, p. 44a):

> An alternative to providing the amount of data necessary to meet the statistical requirements, is to make judgments based upon a reasonable theory * * *.

This Court in the State Farm Mut. case, supra, at p. 2866, recognized that:

> "regulatory agencies do not establish rules of conduct to last forever" * * * and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances."

The second panel of the Court of Appeals did not follow the dictates of this Court regarding the scope of judicial review of administrative decisions.

The Administrator's waiver grant demonstrated the fact that the Agency did adapt its rules and policies to the demands of changing circumstance and did consider all of the information provided and did make an informed judgment from those facts. The second panel of the Court of Appeals nevertheless concluded that the Administrator acted arbitrarily, capriciously and abused her discretion in direct contradiction of the guidelines set forth by this Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mut., supra, at p. 2867, as follows:

> * * * Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. * * * We will, however, "uphold a decision

of less than ideal clarity if the agency's path may reasonably be discerned."

In this case the agency's path is easily discerned and is neither arbitrary nor capricious based upon all of the factors specified as grounds for finding that the Agency's action was arbitrary or capricious.

3. THE ACTIONS OF THE TWO PANELS OF THE COURT OF APPEALS ARE IN DIRECT CONFLICT.

The first panel of the Court of appeals in American Methyl Corp. v. E.P.A., 749 F.2d 826 (1984) decided basically the same issues that were decided in this case for which certiorari is sought. The said case involved all of the parties to this case and no others.

The issues in the proceeding decided in 1984 included a consideration of whether a grant of waiver could be revoked by the granting agency and whether there were any grounds for revocation.

The court in the 1984 decision determined that the record could not be remanded for possible revocation because § 211(c) of the Clean Air Act is the "exclusive" means by which the Administrator was to correct waivers mistakenly granted by default and (749 F.2d at p. 836):

> * * * What suffices to correct waivers mistakenly granted by default should also suffice to correct the (hopefully) far smaller proportion of waivers mistakenly granted after careful consideration.

The court in the 1984 decision also considered the reasons proposed as grounds for revocation and found that there were three reasons stated. One of these was based on new evidence presented to the Agency after the Agency issued a notice in the Federal Register on May 2, 1983, proposing to revoke the waiver and the other two were "make-weights by EPA's own admission" ( 749 F.2d at p. 837) and were "red herrings" (749 F.2d at p. 838).

> The court concluded that any "implied power to revoke waivers under Section 211(f) of the Clean Air Act [is] contrary to the intention of Congress and the design of that statute." (749 F.2d at p. 840).

The said court then remanded that case for further proceedings under § 211(c), if the Administrator deems them desirable. The said remand was not appealed, is a final determination, is in accordance with the statutory scheme and is in direct conflict with the determination in the instant case. Said determination being that the

remedy for issuance of an erroneous waiver is vacation by judicial action and not remand for consideration pursuant to the § 211(c) mechanism provided by Congress for rectifying mistaken actions.

This case is one of first impression in this Court, is of extreme importance to all parties who are now attempting to provide alternative sources of fuel or may be willing to invest in such a venture in the future. The court in the 1984 decision summarized the situation as follows (749 F.2d at pp. 839-840):

> By upholding Congress's disinclination to grant EPA un unguided and open-ended power to revoke waivers, we ensure that entities subject to regulation under section 211 know what is expected of them. Protecting the legitimate expectations of fuel manufacturers comports with basic fairness; it also encourages investment in technology to create more efficient, less costly, and less polluting substitutes for conventional fuels.
>
> Because a manufacturer could never know ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment, he

might well decide not to risk his capital in the first place. As a consequence, the public and this nation would suffer from lack of innovation in fuels and fuel additives, to the ultimate detriment of air quality and our national security.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dale E. Anderson

Claron C. Spencer

October 1985

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AMERICAN MOTORS CORPORATION,
CHRYSLER CORPORATION,
GENERAL MOTORS CORPORATION,
and VOLKSWAGEN OF AMERICA, INC.,
*Respondents*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
*Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

AMERICAN METHYL CORPORATION,
*Intervenor*

---

No. 81-2279

GENERAL MOTORS CORPORATION,
*Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

AMERICAN METHYL CORPORATION,
*Intervenor*

---

Petitions for Review of an Order of the Environmental Protection Agency

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Argued May 14, 1985

Decided July 26, 1985

*Gary P. Toth*, with whom *William H. Crabtree*, *Mark Slywynsky*, *Michael W. Grice*, *Robert G. Seasonwein* and *William L. Weber, Jr.* were on the brief, for petitioners in Nos. 81-2276 and 81-2279.

*David E. Dearing*, Attorney, Department of Justice, with whom *Samuel I. Gutter*, *Robert A. Weissman*, Attorneys, *A. James Barnes*, General Counsel, *Gerald K. Gleason*, Assistant General Counsel, Environmental Protection Agency and *Jose R. Allen*, Attorney, Department of Justice were on the brief, for respondents in Nos. 81-2276 and 81-2279. *Nancy Marvel* and *Ralph Colleli, Jr.* entered appearances for respondents in Nos. 81-2276 and 81-2279.

*James W. Moorman*, with whom *Scott N. Stone*, *Russell V. Randle* and *David B. Robinson* were on the brief, for intervenor American Methyl Corporation. *Arnold B. Podgorsky* and *Laurence S. Kirsch* entered appearances for intervenor in Nos. 81-2276 and 81-2279.

*V. Peter Wynne* was on the brief for Atlantic Richfield Company, *amicus curiae*, urging reversal in Nos. 81-2276 and 81-2279.

*Milton D. Andrews* and *Lance E. Tunick* were on the brief for Automobile Importers of America, Inc., *amicus curiae*, urging reversal in Nos. 81-2276 and 81-2279.

Before: TAMM, WALD and MIKVA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Petitioners[1] seek review of a decision of the Administrator of the Environmental Pro-

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[1] The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), American Motors Corporation, Chrysler Corporation, General Motors Corporation ("GM" or "General

tection Agency (the "Administrator" or the "EPA") to grant a waiver of the Clean Air Act's (the "Act") restrictions on new fuels or fuel additives, *see* 42 U.S.C. § 7545(f)(4), to American Methyl Corporation[2] for a proprietary fuel known as Petrocoal. Finding that the EPA's decision to grant the waiver was arbitrary, capricious and an abuse of discretion, we vacate the Petrocoal waiver and remand to the agency for further proceedings consistent with this opinion.

## I. BACKGROUND

Since this court has already had occasion to set forth the background of this case in *American Methyl Corp.* v. *EPA*, 749 F.2d 826 (D.C. Cir. 1984), we present here only a brief synopsis of that background, highlighting the facts particularly relevant to the present petition. The statutory provision at issue is section 211(f) of the Clean Air Act which places substantial restrictions on new fuels or fuel additives (collectively referred to as "fuel"). Specifically section 211(f)(1) makes it

> . . . unlawful for any manufacturer . . . to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles . . . which is not substantially similar to any fuel or fuel additive

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Motors") and Volkswagen of America, Inc. are jointly prosecuting the petition for review in No. 81-2276. General Motors is the petitioner in the consolidated action, No. 81-2279. MVMA is a trade association of automobile manufacturers. The petitioners are collectively referred to in this opinion as "petitioners" or "MVMA." Atlantic Richfield Company ("ARCO") and Automobile Importers of America, Inc. ("AIA") filed *amici curiae* briefs in support of the petitioners.

[2] American Methyl Corporation is an intervenor in this case on the side of the EPA. At the time of the waiver decision and up until June 30, 1982, American Methyl was incorporated under the name Anafuel Unlimited. We refer to the corporation by its current name, American Methyl.

> utilized in the certification of any . . . [1975 or later model year vehicle or engine].

42 U.S.C. § 7545(f)(1).[3] Section 211(f)(4), however, allows the Administrator to waive this prohibition in specified circumstances:

> The Administrator, upon application of any manufacturer . . . may waive the prohibitions established . . . if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 7525 of this title.

42 U.S.C. § 7545(f)(4).

On February 20, 1981, American Methyl applied for a section 211(f)(4) waiver for a methanol/gasoline blend fuel called Petrocoal. EPA published a public notice on April 13, 1981, acknowledging receipt of the application and soliciting comments on whether Petrocoal met the waiver criteria. *See* 46 Fed. Reg. 21,695 (1981), Joint Appendix ("J.A.") at 79. Under section 211(f)(4), a waiver is treated as granted if the Administrator fails to grant or deny the application within 180 days of its

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[3] "Certification" refers to the process of testing and issuance of a certificate of conformity required by section 206(a) of the Act, 42 U.S.C. § 7525(a), whereby manufacturers must demonstrate, under carefully controlled procedures that their vehicles, or any engine or emission control system incorporated therein, conform with the applicable emissions standards prescribed in 42 U.S.C. § 7521.

receipt. 42 U.S.C. § 7545(f)(4).[4] By mutual consent of the EPA and American Methyl, this 180-day review period, scheduled to expire on August 19, 1981, was extended, *see* 46 Fed. Reg. 43,082 (Aug. 26, 1981) (30 day extension) and 46 Fed. Reg. 47,299 (Sept. 25, 1981) (10 day extension), until September 28, 1981, when EPA granted a conditional waiver for Petrocoal. *See* Petrocoal Waiver, 46 Fed. Reg. 48,975 (Oct. 5, 1981). The Administrator[5] determined that American Methyl had met the burden necessary to establish its eligibility for a waiver for Petrocoal under section 211(f)(4) provided that the finished fuel met the following conditions:

> [T]he concentration of methanol . . . does not exceed 12 percent, by volume, the concentration of total alcohols in the fuel does not exceed 15 percent, by

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[4] Intervenor American Methyl argues that the provision that a waiver is automatically granted if the Administrator fails to act within 180 days indicates that Congress intended a lenient burden of proof under section 211(f)(4) and that we should accord special deference to the Administrator's decision. *See* Brief for American Methyl at 25, 27-29. Section 211(f)(4), however, establishes a clear burden on the waiver applicant to establish that the new fuel will not cause or contribute to the failure of any emission control device to achieve compliance with emission standards over the useful life of a vehicle. *See infra* pp. 11-12. Neither the Act nor its legislative history indicates how Congress intended us to reconcile the clear burden placed on the waiver applicant to qualify for a waiver grant and the automatic granting of a waiver in the absence of action by the Administrator within 180 days. We find it most plausible to construe the 180-day limitation as a means of ensuring prompt administrative action on waiver applications; hence, we reject American Methyl's assertion that it has any bearing on the applicant's burden of proof. We also note that the 180-day period in no way limits the time an applicant has to conduct tests and compile the necessary information to qualify for a waiver *prior* to filing an application.

[5] The waiver was actually signed by the Acting Administrator John W. Hernandez not the then current Administrator Anne M. Gorsuch. For ease of reference we will refer to the Administrator on whose behalf the waiver was granted.

> volume, the ratio of methanol to four-carbon alcohols in the finished fuel does not exceed 6.5 to 1, by volume and the finished fuel is blended such that it meets the American Society for Testing and Materials (ASTM) fuel volatility specifications for the area and time of year in which it is sold.
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> *Id.* at 48,976.

On December 4, 1981, MVMA filed both a petition for administrative reconsideration of the waiver by the EPA and the present petition for judicial review of the waiver by this court. The EPA did not act on MVMA's petition for administrative reconsideration. On February 22, 1983, MVMA filed a supplemental petition for reconsideration supported by new data which purportedly contradicted one of the EPA's basic assumptions in granting the waiver—namely that increased evaporative emissions due to the use of Petrocoal could be controlled by controlling the volatility of the blended fuel. This supplemental petition together with the new data submitted prompted the EPA to reconsider the waiver grant, *see* 48 Fed. Reg. 19,779, 19,780 (1983) (notice and request for comments on petition for reconsideration), and to a proposed revocation of the waiver. *See* 49 Fed. Reg. 11,879, 11,885 (1984) (notice of reconsideration and proposed revocation of Petrocoal waiver). Coincidentally with the EPA's publication of the proposed notice of revocation, the parties to the pending petition for judicial review of the waiver grant jointly moved to remand the record to the EPA for further administrative proceedings. This court granted that motion on April 3, 1984.

A month later on May 3, 1984, however, American Methyl formally requested the EPA to terminate the revocation proceeding on the ground that section 211(f) did not authorize the EPA to revoke a waiver. The EPA's General Counsel denied this request in a letter

ruling dated June 8, 1984. American Methyl petitioned this court for judicial review of both the notice of proposed revocation and the letter ruling. On July 27, 1984, this court granted American Methyl's motion to stay the EPA's proposed revocation proceeding. On the merits, this court held that the EPA may not revoke a waiver pursuant to section 211(f), but may forbid the marketing of Petrocoal pursuant to section 211(c) which grants the Administrator the authority to regulate fuels or fuel additives. *American Methyl*, 749 F.2d at 828. The case was remanded to the EPA for further proceedings pursuant to section 211(c). To date, the EPA has not initiated a proceeding to regulate Petrocoal under section 211(c).

Following this court's remand to the EPA for further proceedings pursuant to section 211(c), MVMA moved the court to order the return of the record on its petition for review of the original waiver decision and to hear oral argument. The court granted the motion on February 13, 1985, and oral argument was heard on May 14, 1985.

The principal issue presented in this case is the reasonableness of the EPA's determination that American Methyl sufficiently established that Petrocoal met the criteria to qualify for a waiver under section 211(f)(4). This challenge to the grant of the Petrocoal waiver, however, has raised two initial questions of statutory construction related to the showing an applicant must make in order to qualify for a section 211(f)(4) waiver. Specifically, the statutory questions are: (1) Does section 211(f)(4) require the EPA to determine that a fuel will not cause or contribute to *any* increase in emissions or only that it will not cause or contribute to an increase which exceeds applicable emission standards; and (2) Does section 211(f)(4) oblige the EPA to require applicants to submit emission data on vehicles tested over a 50,000-mile period or may the EPA evaluate the long-

term effects of a new fuel on the basis of reasoned technical judgments?

## II. Statutory Construction Questions

This court in reviewing the EPA's construction and implementation of the terms of section 211(f)(4) may reverse the agency's action only if it is outside the bounds of its statutory authority, *see American Methyl*, 749 F.2d at 833 (citing section 307(d)(9)(C) of the Clean Air Act, 42 U.S.C. § 7607(d)(9)(C)), or if it is arbitrary, capricious, or an abuse of discretion.[6] With respect to issues of statutory construction, if Congress' intent can be ascertained from the plain language of the statute

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[6] Intervenor American Methyl argues that section 307(d)(9), 42 U.S.C. § 7607(d)(9), governs our review in this case, whereas MVMA argues that the Administrative Procedure Act, 5 U.S.C. § 706, governs. While not expressly addressing the issue, this court in *American Methyl*, 749 F.2d at 833, apparently construed section 307(d)(9) of the Clean Air Act to govern review of the EPA's actions pursuant to section 211(f). We find it unnecessary to decide this issue here since the standard we apply (i.e., whether the EPA's actions were in excess of statutory authority or arbitrary and capricious) is the same under either Act. *See* Small Refiners Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519 (D.C. Cir. 1983) (the standard for substantive judicial review under the Clean Air Act is taken directly from the Administrative Procedure Act).

The scope of our review under the arbitrary and capricious standard is well established. We must engage in a "searching and careful" review of both the facts and the agency's reasoning to ensure that the agency's decision was a product of reasoned decisionmaking based upon a consideration of the relevant factors. *Id.* at 520 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Ethyl Corp. v. EPA, 541 F.2d 1, 35 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976)); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (Agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

or its legislative history then that intent must be given effect. *See Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 n.9 (1984). If, on the other hand, the court determines that Congress has not directly addressed the question at issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. With these precepts in mind, we turn to the statutory questions of whether section 211(f)(4) compels the Administrator to deny a waiver application if the fuel causes *any* increase in emissions and to require the applicant to submit 50,000-mile durability data.

A. *Requisite Finding With Respect to Emission Increases*

The EPA contends that to grant a waiver under section 211(f)(4), the Administrator is required only to determine that the fuel will not cause vehicles to exceed applicable emission standards. Brief for EPA at 9. The EPA makes this argument in response to MVMA's and amicus AIA's assertions that Congress intended section 211(f)(4) to preclude the grant of a waiver if the fuel caused *any* increase in emissions. *See* Brief for MVMA at 30, 43; Brief for AIA at 19-22; *but see* Brief for MVMA at 26, 45 (referring to *any increase* which causes or contributes to a vehicle's *failure* to meet emission standards). AIA contends that the Act's language stating that a waiver must be denied if a fuel "contributes" to a failure to achieve compliance with emission standards "means that a waiver must be denied if the subject fuel causes *any* increase in emissions." Brief for AIA at 20 (emphasis in original); *see also* Reply Brief for MVMA at 12-13. We note at the outset that the decision whether to grant a waiver is committed to the discretion of the Administrator. *See* 42 U.S.C. § 7545(f)(4) ("The Administrator . . . *may* waive the prohibitions . . .") (emphasis added). Thus, the question is not whether the Administrator *may* deny a waiver on the basis of an increase in emissions not amounting to a

failure to meet emission standards, but whether section 211(f)(4) mandates that the Administrator *must* deny a waiver if a fuel causes *any* increase in emissions.

The plain language of section 211(f)(4) refers not to *any increase* in emissions but to "a *failure* of any emission control device or system . . . to achieve compliance . . . with the [applicable] emissions standards . . ." 42 U.S.C. § 7545(f)(4). Section 211(f)(4) was added to the Clean Air Act in 1977. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 222, 91 Stat. 685, 763-64.[7] The Senate version of section 211(f)(4), relied upon by AIA, would have required a waiver applicant to establish that the fuel did not *impair* emission performance. *See* S. Rep. No. 127, 95th Cong., 1st Sess. 90-91 (1977). The conferees, however, rejected the Senate version, and in adopting the current language of section 211(f)(4) stated:

> Thus, if a fuel or fuel additive causes an increase in engine emissions so as to increase tail pipe emis-

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[7] The Senate Committee in 1977 received testimony that a certain fuel additive, MMT, "was impairing the performance of emission control systems and increasing hydrocarbon emissions in test vehicles." S. Rep. No. 127, 95th Cong., 1st Sess. 90 (1977). The Committee was concerned that existing section 211(c), which allows the Administrator to control or prohibit fuels by regulation, could not adequately protect emissions systems currently in use from the possible deterioration caused by MMT, or other new fuels or additives, due to the delay associated with the procedural safeguards required in section 211(c) proceedings. *Id.* As a result, the Committee proposed and Congress ultimately enacted section 211(f) banning new fuels or fuel additives not substantially similar to those utilized in the certification of any 1975 or later model year vehicle or engine. The Senate Committee proposed including the waiver provision found in section 211(f)(4) because "[t]he committee was concerned with the increased use of crude oil that would be necessitated by the prohibition in use of MMT or other octane raising agents, and the smaller refineries that would be adversely affected by these provisions when lead phase-down requirements were taken into account." *Id.* at 91.

> sions or interferes with performance of a specific device or element of emission control *so as to cause or contribute to the vehicle's failure to meet the standards at any point in its useful life, the Administrator could not waive the prohibition.*

H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 161 (1977) (emphasis added). Thus we find that both the plain language of the Act and its legislative history support the EPA's view that the Administrator is not required under section 211(f)(4) to adopt a "no increase" standard and may grant a waiver as long as the fuel does not cause or contribute to a failure to achieve compliance with emission standards. *Cf. Specialty Equip. Mkt. Ass'n* v. *Ruckelshaus*, 720 F.2d 124, 133-34 (D.C. Cir. 1983) (rejecting MVMA's contention that section 207(a)(2) of the Act required a "no-increase" standard with respect to the certification of aftermarket parts).

B. *50,000-Mile Durability Testing*

Section 211(f)(4) provides that, to qualify for a waiver, an applicant must establish that the fuel "will not cause or contribute to a failure of any emission control device or system (*over the useful life of any vehicle in which such device or system is used*) to achieve compliance by the vehicle with the [applicable] emission standards." 42 U.S.C. § 7545(f)(4) (emphasis added). The Conference Report states that a waiver could not be granted if the fuel caused or contributed to the "vehicle's failure to meet the standards *at any point* in its useful life." H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 161 (1977) (emphasis added); *see supra* p. 10 (quoting passage in full). Section 202(d), 42 U.S.C. § 7521(d), defines the "useful life" of a vehicle as five years or 50,000 miles, whichever occurs first. Petitioners argue that both the language of section 211(f)(4) and its legislative history clearly indicate that an applicant

must submit data which measure the fuel's effect on emissions over the "useful life" of the vehicle (*i.e.*, 50,000-mile durability testing).[8] *See* Brief for MVMA at 27-30, 37-41. Thus petitioners claim that the EPA erred in granting the Petrocoal waiver in the absence of 50,000-mile durability data.

The EPA, however, has established a practice of not requiring 50,000-mile durability testing where it determines that the emissions effect of the fuel is of an instantaneous, not deteriorative, nature. *See* Oxinal Waiver, 44 Fed. Reg. 37,074 (1979); MTBE Waiver, 44 Fed. Reg. 12,242 (1979); TBA Waiver, 44 Fed. Reg. 10,530 (1979). Instead the EPA requires only "back-to-back" testing.[9] This practice is predicated upon EPA's general

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[8] Conducting 50,000-mile durability testing involves operating a matched set of vehicles for 50,000 miles and performing emissions tests on each vehicle at 5,000-mile intervals. This is essentially the same testing method required of automobile manufacturers to obtain new motor vehicle certification under section 206 of the Act. *See* Petrocoal Waiver, 46 Fed. Reg. at 48,976 n.7; *see also supra* note 3 (defining "certification").

[9] If a fuel is predicted to have only an instantaneous effect on emissions then the fuel is predicted to cause an immediate, incremental shift in the emission levels relative to a base fuel and this shift is predicted to remain constant throughout the useful life of the vehicle. "Back-to-back" emission testing is considered by the EPA to be sufficient where only instantaneous effects are predicted. Back-to-back emission testing refers to the testing of a vehicle on a base fuel, then testing the same vehicle on the waiver fuel. The difference in emission levels is attributed to the waiver fuel. The EPA uses three statistical tests to evaluate the emission data provided with respect to a fuel expected to have an instantaneous emission effect: (1) the Paired Difference Test which determines the mean difference in emissions between the base fuel and the waiver fuel; (2) the Sign of the Difference Test which assesses the number of vehicles exhibiting an increase or decrease in emissions; and (3) the Deteriorated Emissions Test which indicates whether the waiver fuel will cause or contribute to a failure to meet emission standards by comparing deteriorated emissions with the emis-

interpretation of the burden of proof required of an applicant under section 211(f)(4). Specifically, the EPA states:

> This burden, which Congress has imposed on the applicant, if interpreted literally, is virtually impossible to meet as it requires proof of a negative proposition, *i.e.*, that no vehicle will fail to meet emission standards with respect to which it has been certified. Taken literally, it would require the testing of every vehicle. Recognizing that Congress contemplated a workable waiver provision, mitigation of this stringent burden was deemed necessary. For purposes of the waiver provision, EPA has previously indicated that reliable statistical sampling and fleet testing protocols may be used to demonstrate that a fuel under consideration would not cause or contribute to a significant failure of emission standards by vehicles in the national fleet.

Petrocoal Waiver, 46 Fed. Reg. at 48,976; TBA Waiver, 44 Fed. Reg. at 10,530. Having determined that sample testing of vehicles is an appropriate method for establishing that a fuel qualifies for a waiver under section 200(f)(4), the EPA then further considered which specific testing methods were appropriate in given cases. The EPA concluded that back-to-back testing and statistical projections are sufficient where a fuel is predicated to have only instantaneous effects, *see supra* note 9, and that 50,000-mile durability testing is only required where a fuel is predicated to have long-term deteriorative effects. *See, e.g.*, Petrocoal Waiver, 46 Fed. Reg. at 48-976; TBA Waiver, 44 Fed. Reg. at 10,351. The EPA justifies this latter determination regarding the requisite testing sufficient to qualify for a section 211(f)(4)

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sion standards in lieu of actually having 50,000-mile emission data. *See* Petrocoal Waiver, 46 Fed. Reg. at 48,976 & Appendix A (describing statistical tests).

waiver on the ground that the legislative history of section 211(f)(4) indicates that the EPA in evaluating the long-term effects of a fuel is only required to take into account "the deterioration factors employed in certifying the engine." Brief for EPA at 12 (citing H.R. Conf. Rep. No. 564 at 161).[10] The EPA asserts that the statistical tests used to evaluate the emissions effect of a fuel expected to have an instantaneous effect on emissions, namely the Deteriorated Emissions Test, *see supra* note 9, takes full account of the deterioration factors used in certifying the vehicles.[11] The EPA further asserts that it may apply sound technical judgment to determine

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[10] Specifically the passage relied upon by the EPA states:

> The conferees also intend that the words "cause or contribute to the failure of an emission control device or system to meet emission standards over its useful life to which it has been certified pursuant to section 206" mean the noncompliance of an engine or device with emission levels to which it was certified, taking into account the deterioration factors employed in certifying the engine.

H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 161 (1977).

The EPA further contends that the term "deterioration factors" was drawn directly from the EPA's regulations, and refers to the manufacturer's projection of the amount of emissions degradation expected over a vehicle's useful life. *See* Brief for EPA at 13 (citing 40 C.F.R. § 86.082-28(a)).

[11] Specifically the Deteriorated Emissions Test takes account of the deterioration factor or amount of projected emissions degradation over the vehicle's 50,000-mile useful life as follows:

> For each vehicle, the effect the waiver fuel or fuel additive had on emissions is determined. This incremental effect, either positive or negative, is added to the 50,000-mile certification emission value of the certification emission vehicle which the test vehicle presented. This incremental 50,000-mile emission value is compared to emission standards to determine if it did or did not exceed the standards. Either a pass or fail is assigned accordingly. The pass/fail results are analyzed using a one-sided sign test.

Petrocoal Waiver, 46 Fed. Reg. at 48,978.

whether a fuel is expected to have an instantaneous or deteriorative effect on emissions and that, where alternative methodologies are available for evaluating the long-term effects of a fuel, nothing in the Act or its legislative history precludes the use of these alternatives to the costly and time-consuming method of actual 50,000-mile testing. *See* Brief for EPA at 13-14.

We find merit in both petitioners' and the EPA's arguments on this issue. We agree with petitioners that both the language of section 211(f)(4) and its legislative history specifically provide that, for a fuel to qualify for a waiver, the EPA must determine that the fuel will not cause or contribute to a vehicle's failure to meet the applicable standards at any time during its useful life. On the other hand, we also find persuasive the EPA's argument that actual 50,000-mile durability testing may not always be required to make the requisite determination that a fuel will not cause a vehicle to exceed emission standards over its useful life. Clear evidence before the EPA may allow it to conclusively rule out the possibility of long-term, deteriorative effects, thus making the EPA's Deteriorated Emissions Test sufficient and obviating the need for actually conducting costly and time-consuming 50,000-mile durability tests.[12] Section 211(f)(4) only requires that the EPA determine that a fuel will not cause or contribute to a failure of an emission device to comply with applicable emission standards during a vehicle's useful life, it does not specify that the EPA must base this determination on actual 50,000-mile durability tests in all cases. Nonetheless, given section 211(f)(4)'s clear directive that the EPA must evaluate the effect of a fuel over the useful life of a vehicle, the EPA must have a

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[12] We note that there are exceptions to the 50,000-mile testing requirement with respect to vehicle certification pursuant to section 206 of the Act. *See* 40 C.F.R. § 86.081-13 (1984) (alternate durability program); *id.* § 86.082-14 (1984) (exception for small volume manufacturers).

clearly sound basis for determining in a given case that back-to-back testing provides an adequate and sufficient means of evaluation in lieu of actual 50,000-mile testing.

In the present case, however, we are compelled to find that the Administrator apparently lacked any rational basis for concluding that Petrocoal will not cause or contribute to a vehicle's failure to comply with emission standards over its useful life. The Administrator's stated rationale for concluding that Petrocoal will have only an instantaneous, not deteriorative, effect on emissions, simply fails to withstand careful scrutiny. Moreover, even if we accepted the validity of this conclusion, Petrocoal failed—albeit marginally—the Deteriorated Emissions Test performed in lieu of 50,000-mile testing. *See infra* section III-B. Under these circumstances, we have no doubt that the EPA abused its discretion in determining that Petrocoal will not cause a vehicle to exceed the emission standards over its useful life.[13]

The Administrator's stated rationale for concluding that 50,000-mile durability testing was unnecessary for Petrocoal rests entirely on three prior waiver decisions:

> Experience with other oxygenated hydrocarbon additives similar to the alcohols contained in Petrocoal has led EPA to believe that only an instantaneous emission effect should be observed with Petrocoal.

Petrocoal Waiver, 46 Fed. Reg. at 48,977 & n.6 (citing waiver decisions for TBA, 44 Fed. Reg. 10,530 (1979), MTBE, 44 Fed. Reg. 12,242 (1979), and Oxinal, 44 Fed. Reg. 37,074 (1979)). The sufficiency of this rationale

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[13] Given our conclusion in this case that the Administrator lacked a rational basis for determining that Petrocoal will not cause a vehicle to fail to comply with emission standards over its useful life, we find it unnecessary to speculate about the precise circumstances in which the EPA might permissibly conclude that a waiver could be granted on the basis of back-to-back testing in the absence of any 50,000-mile durability data.

turns on whether the reasoning and data supporting the three cited waivers can be generalized to reasonably support a conclusion that Petrocoal will have only instantaneous, not deteriorative, emission effects thus obviating the need for 50,000-mile testing. Upon a review of the three waiver decisions, we conclude that they fail either singularly or in combination to provide a reasonably sufficient basis for the EPA's conclusion.

In the TBA waiver decision, the EPA granted ARCO a waiver for a fuel additive, Arconol, in a concentration of 0 to 7 volume percent, which consists primarily of tertiary butyl alcohol (TBA). *See* TBA Waiver, 44 Fed. Reg. at 10,530 & n.2. No. 50,000-mile durability testing was conducted. The EPA concluded that back-to-back testing would provide a reasonable estimate of a vehicle's emission performance on Arconol based on an examination of the available data on materials compatibility [14] and the chemistry of Arconol. *Id.* at 10,531 & n.9. The EPA further noted that ARCO had been "using up to 5% Arconol since 1970 and up to 7% since 1974 without apparent material compatibility problems. Therefore, the vehicle manufacturers should have already accommodated for Arconol in their design." *Id.* at 10,532 n.16.

In the MTBE waiver decision, the EPA granted ARCO a waiver for methyl tertiary butyl ether (MTBE) in a concentration range of 0 to 7 volume percent. *See* MTBE Waiver, 44 Fed. Reg. at 12,243. As in the TBA waiver, the EPA determined that 50,000-mile durability testing was unnecessary based upon an examination of the available data on materials compatibility and the chemistry of MTBE. *Id.* at n.10. The EPA's conclusion here that 50,000-mile test data should not be required was, however, supported by limited durability data. *Id.* at 12,244

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[14] Materials compatibility testing refers to testing conducted to determine the potential deteriorative effects of a fuel or fuel additive on the materials used in fuel and emission control systems.

n.11. Specifically the EPA referenced a limited durability test program conducted by Texaco using six vehicles, each of which accumulated 20,000 miles on a dynamometer.

Finally in the Oxinal waiver decision, the EPA granted Sun Petroleum Products Company a waiver for a proprietary oxygenated hydrocarbon fuel additive which provides no more than two percent oxygen in the fuel. Oxinal Waiver, 44 Fed. Reg. at 37,074. At the time of the waiver grant, the composition of Oxinal was kept confidential. The waiver was predicated, *inter alia*, upon the condition that the Administrator could revoke the waiver based on new data submitted after the public disclosure of Oxinal's chemical composition. *Id.* A subsequent disclosure notice revealed that Oxinal was comprised of a maximum of 2.75 percent by volume of TBA and 2.75 percent by volume of methanol. *See* 45 Fed. Reg. 9766 (1980) (notice of disclosure of chemical composition of fuel additive); *see also* 45 Fed. Reg. 75,755 (1980) (denial of petition to revoke waiver following disclosure of chemical composition). This is the only cited waiver decision which contained methanol, the principal alcohol used in Petrocoal. Once again the EPA concluded, based upon an examination of the available materials compatibility data and the chemistry of the fuel additive, that 50,000-mile durability data testing was not required. *See* Oxinal Waiver, 44 Fed. Reg. at 37,076 & n.10. The EPA also noted that limited durability test data (one vehicle tested at the end of 20,000 miles) supported its conclusion. *Id.* at n.11.

While we intimate no opinion as to the propriety of the EPA's conclusion that 50,000-mile durability testing was not essential in these three waiver decisions, we find the EPA's bootstrap approach of relying on them to support a conclusion that 50,000-mile testing was likewise not required for Petrocoal extremely troubling. Not only were the TBA, MTBE, and Oxinal waiver decisions

themselves predicated on a conclusion that 50,000-mile testing was unnecessary but this conclusion in each case was purportedly based on an evaluation of the materials compatibility data available on and the chemical composition of the *particular* fuel or fuel additive at issue.[15] Out of the three, only Oxinal contained methanol, the principal alcohol in Petrocoal, and it contained only 2.75 percent by volume methanol whereas Petrocoal may contain up to 12 percent by volume methanol.[16] We find this factor particularly telling given the well-recognized special concerns raised specifically with respect to the po-

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[15] We note that in determining that 50,000-mile durability testing was not essential to the Petrocoal waiver, the EPA did not similarly purport to rely on an evaluation of the materials compatibility data available with respect to Petrocoal. Given the Administrator's departure from the established practice of citing to the materials compatibility data on the fuel at issue and the nature of the materials compatibility data on Petrocoal, *see infra* section III-D, we decline to infer that the Administrator relied on this data in concluding that 50,000-mile durability testing was unnecessary. *See infra* note 20.

[16] Petrocoal also has an oxygen content of between 7 and 7½ percent which is considerably greater than that of other fuels for which the EPA has granted section 211(f)(4) waivers (*e.g.*, the Oxinol waiver was conditioned on a maximum allowance oxygen content of 2 percent). The EPA has specifically recognized in a prior waiver decision that:

> [D]riveability may be a problem at higher concentrations of methanol because of the increased oxygen content of the fuel. As oxygen content increases, the air/fuel ratio shifts outside the design sepcifications (enleanment).

Denial of Beker Industries, Inc.'s Application for a Fuel Additive Waiver, 45 Fed. Reg. 26,122, 26,134 (1980). The EPA has also noted "[e]xperience with other waivers [has] demonstrated that increase in emissions, particularly oxides of nitrogen and evaporative hydrocarbons, were proportional to oxygen content." *See* Grant of Application for a Fuel Waiver Submitted by Atlantic Richfield Company (ARCO)—Decision of the Administrator, at 6 (Nov. 7, 1981) (granting waiver for a methanol blend fuel provided that the maximum oxygen content allowable is 3.5 percent), *reprinted in* Brief for MVMA, Appendix N.

tential adverse deteriorative effects of using methanol/gasoline blend fuels. *See generally* J. Keller, G. Nakaguchi, & J. Ware, Final Report: Methanol Fuel Modification for Highway Vehicle Use, Prepared for U.S. Dep't of Energy (HCP/W3683-18) (July 1978).[17]

Indeed, at the time the EPA granted the Petrocoal waiver, it had denied two previous waiver applications for methanol fuel additives. *See* Denial of Conservation Consultants of New England, Inc.'s ("Conservation") Application for a Fuel Additive Waiver, 45 Fed. Reg. 53,861 (1980); Denial of Beker Industries, Inc.'s ("Beker") Application for a Fuel Additive Waiver, 45 Fed. Reg. 26,122 (1980).[18] Particularly relevant is the EPA's general characterization and recognition of the

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[17] We note that in July 1983, the EPA issued a notice in the *Federal Register* announcing that it would hold a public workshop on methanol/unleaded gasoline blends with the purpose of helping the EPA to "assess the meaning of existing data and to better understand the concerns that may exist regarding the use of such blends and the basis for these concerns." *See* 48 Fed. Reg. 32,075 (1983).

[18] Beker requested a waiver for crude methanol in unleaded gasoline from 0 to 15 percent by volume. Conservation requested a waiver for a one-to-one mixture of methanol and ethanol at 10 percent by volume (*i.e.*, 5 percent methanol and 5 percent ethanol) to be blended with 90 percent, by volume, unleaded gasoline. While in both decisions, the EPA did state generally that "[e]xperience with other oxygenated hydrocarbon additives leads EPA to believe that [the mixture at issue] would probably have an instantaneous effect [on emissions]," it gave no citation to any other waiver decision or supporting data. *See* Conservation Waiver, 45 Fed. Reg. at 53,862 n.3; Beker Waiver, 45 Fed. Reg. at 26,123 n.2. Moreover, the EPA qualified this conclusion in both decisions stating: "The . . . mixture may also exhibit long-term deteriorative effects on fuel system components. Therefore any future waiver application should be supported with materials compatibility testing." *Id.* Both applications were denied on the ground that the applicant failed to submit sufficient data to establish that the methanol/gasoline blend would not cause or contribute to a vehicle's failure to meet emission standards over its useful life.

potential problems associated with methanol/gasoline blends set forth in the Beker decision:

> To summarize, the various data on methanol/gasoline mixtures are not encouraging. Generally such mixtures exhibit only slight effects on tailpipe exhaust emissions, but they generally appear to have appreciably greater evaporative emissions than gasoline. This is because of the higher volatility of fuels containing a significant amount (approximately 10%) of methanol. Methanol/gasoline mixtures are also more chemically active than gasoline because of the methanol. Thus, such mixtures may exhibit materials compatibility problems. Finally, driveability may be a problem at higher concentrations of methanol because of the increased oxygen content of the fuel. . . .
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> These observations on methanol/gasoline fuels. [sic] . . . are not intended as final judgments concerning methanol, but to highlight EPA's concerns about methanol/gasoline fuels[. A waiver request for such methanol/gasoline fuels] will have to be supported by sufficient data to overcome the existing data which suggest that methanol/gasoline mixtures may cause or contribute to a failure of vehicles to comply with emission standards over their useful life.

Beker Waiver, 45 Fed. Reg. at 26,124.

In the context of evaluating the Petrocoal waiver request, a technical report was prepared which reviewed the available literature on the compatibility effects of methanol/gasoline blends containing 10-15 percent methanol, with special attention to the beneficial effects of inhibitors and four-carbon ("C-4") alcohols in compensating for the adverse effects of methanol. *See* R. Garbe, Technical Report: A Review of the Compatibility of Methanol/Gasoline Blends with Motor Vehicle Fuel Sys-

tems (May 1981), *reprinted in* Brief for MVMA, Appendix I. While not purporting to represent the EPA's final position or to be based on the specific testing of Petrocoal, the report, nonetheless reached the following general conclusion based on a review of data available on methanol/gasoline blends: "[T]here appears to be no available data, either in the published literature or supplied by [American Methyl], which would conclusively demonstrate that Petrocoal would be safe (from an emission control standpoint) to operate in currently available motor vehicles over long time periods." *Id.* at 4. The report recommended that emissions durability to 50,000 miles should be demonstrated. *Id.* In the Petrocoal waiver decision itself, although concluding 50,000-mile durability testing unnecessary, the EPA equivocated stating:

> In reviewing future waiver applications for fuel containing high percentages of methanol without the presence of cosolvents and special inhibitors some long-term durability testing may be [required].

Petrocoal Waiver, 46 Fed. Reg. at 48,977 (footnote omitted). The EPA further said that such a determination would have to be made on a case-by-case basis. *Id.* at n.9.

As the foregoing discussion of the three waiver decisions and the special concerns raised about methanol blends amply illustrates, the TBA, MTBE, and Oxinal waiver decisions can in no way be construed to provide a reasonable basis for the EPA's conclusion that Petrocoal —a fuel containing up to 12 percent methanol—would have only instantaneous, not deteriorative, effects. The presence of undisclosed special inhibitors and cosolvents in Petrocoal does not change this conclusion. The effectiveness of the additives at preventing any potential deteriorative effects resulting from the use of a methanol blend fuel similar to Petrocoal was neither at issue

nor established by the three cited waiver decisions. *Cf. infra* p. 35 (discussing relevance of proprietary inhibitor with respect to materials compatability).

## III. Analysis of the Test Data Submitted on Petrocoal

We now turn to petitioners' challenges to the sufficiency of the emissions data which was submitted on Petrocoal and the reasonableness of the EPA's determination, based upon its evaluation of the data, that Petrocoal will not cause or contribute to a vehicle's failure to meet the applicable emission standards over its useful life.

### A. *Maximum Concentration Limits Are Not Supported in the Record*

The EPA determined that American Methyl had met the burden established by section 211(f)(4) to qualify for a waiver "provided the concentration of methanol in the finished fuel does not exceed 12 percent, by volume, the concentration of total alcohols in the fuel does not exceed 15 percent, by volume, the ratio of methanol to four-carbon alcohols in the finished fuel does not exceed 6.5 to 1 by volume . . . ." Petrocoal Waiver, 46 Fed. Reg. at 48,976. Petitioners, however, contend that the record is inconclusive as to whether this maximum concentration fuel was ever tested. *See* Brief for MVMA at 34.[19] The

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[19] American Methyl argues that this court has previously stated that it would uphold an EPA decision setting a numerical standard so long as the standard selected was within a "zone of reasonableness" and was properly explained. *See* Brief for American Methyl at 51 (citing *Small Refiners*, 705 F.2d at 525). We find this argument unpersuasive. First, the maximum concentration levels set by the EPA were not properly explained in this case. Second, the EPA's guidelines for section 211(f)(4) waivers for alcohol-gasoline blends specifically state:

> [E]missions performance may be critically dependent upon its concentration in use. Data submitted should encompass the range of concentrations intended for use. No attempt by EPA

EPA in its brief concedes that "the record does not appear to support these limits," and asks the court for a remand in order to reconsider the appropriate limits. Brief for EPA at 15; *see also id.* at 16 ("the record does not appear to support key elements of the waiver"). While we agree with intervenor American Methyl's assertion that we are not bound by the EPA's concession but may make our own independent judgment as to whether the concession is warranted, our own review has uncovered nothing which persuades us that the EPA's concession is unwarranted.[20]

Emissions data on Petrocoal were provided from three sources. *See* Characterization Report—Anafuel Unlimited, J.A. at 232, 233-34. American Methyl, in support of its

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to extrapolate data to a permissible concentration level is contemplated.

Guidelines for Section 211(f) Waivers for Alcohol-Gasoline Blends, 43 Fed. Reg. 24,131, 24,132 (1978).

[20] Intervenor Americal Methyl attempts in its brief to rationalize the Administrator's decision by providing reasons and analysis not stated in the decision. *See, e.g.*, Brief for American Methyl at 50-55. American Methyl argues that although the Administrator may not have fully articulated her path of analysis, the court may uphold the agency if that path can reasonably be discerned from the record. *See id.* at 53 (citing Bowman Trans., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974); *Small Refiners*, 705 F.2d at 533-34). While this court may indeed adopt such a course of action in appropriate cases, this is not one. The evidence in the record and the Administrator's decision are simply not of the nature which would warrant this court attributing to the Administrator reasons not even hinted at in the decision. In *Small Refiners*, 705 F.2d at 533-34, we recognized the settled rule that neither the courts nor counsel may provide new or substitute reasons for the agency's action; we, however, noted:

> [T]his is not a case where EPA failed to give any reasons or gave unsupported reasons for its belief. . . . Rather, EPA merely failed to articulate its reasons in any detail. . . .

*Id.*

waiver request for the use of Petrocoal, submitted back-to-back Federal Test Procedure (FTP) data on eight 1970 or later model year light duty vehicles. General Motors tested four 1980 or later model year vehicles using samples supplied by American Methyl containing 10 percent total alcohols. The EPA's Office of Mobile Source Air Pollution arranged for testing of four 1979 and later model year vehicles using samples supplied by American Methyl containing 13 percent total alcohols.

It is uncontested that neither the fuel tested by GM nor by the EPA contained the maximum concentration limits of total alcohols or the maximum percentage ratio of methanol to C-4 alcohols allowed by the waiver. Whether the fuel tested by American Methyl contained the maximum concentrations is a matter of controversy. American Methyl's waiver application reported that the fuel it tested contained "15% of [American Methyl's] proprietary oxygenated hydrocarbon." Anafuel Unlimited, Application for Waiver (Feb. 20, 1981), J.A. at 1, 6. No other information, such as the ratio of methanol to C-4 alcohols, is provided. GM in its comments raised the issue that American Methyl had informed GM that the additive contained non-alcohol as well as alcohol hydrocarbons, thus GM asserted that the fuel tested by American Methyl may have contained a total alcohol content of less than 15 percent. *See* Comments of General Motors Corporation on the Anafuel Unlimited Application for a Fuel Additive Waiver (July 6, 1981) ("GM Comments"), J.A. at 121, 124, 127, 132. This issue was not addressed in the Administrator's decision. The EPA now concedes that its "conclusion that the Petrocoal samples tested by [American Methyl] contained 15% alcohol [citing the Characterization Report, J.A. at 234-35] might have been in error." Brief for EPA at 15 n.21. We find no clear and unequivocal verification in the record that the fuel tested by American Methyl contained the maximum concentration levels or percentage ratio permitted by the

waiver.[21] Hence, as the EPA concedes, the record does not support the maximum limits allowed by the waiver. Moreover, the fact the "worst case" fuel might not have been tested casts doubt on the confidence we may place in any of the test results on Petrocoal cited to support the waiver decision.

American Methyl filed a supplemental brief in this case asserting that we should reject the EPA's concession that the record does not support the maximum alcohol limits and percentage ratio specified in the waiver because this court determined in *American Methyl* that this very concession was a "make-weight" and "red herring." *See* Supplemental Brief for Intervenor American Methyl at 5-9. We find that the court's statements in *American Methyl* are limited to the context of that case and have no bearing on the validity of the EPA's representations regarding the state of the record evidence supporting the original waiver decision for Petrocoal.

In *American Methyl*, this court held that the EPA had no inherent authority to reconsider or revoke a waiver under section 211(f)(4) but must instead proceed to prohibit or regulate the fuel under section 211(c). *American Methyl*, 749 F.2d at 831. The court explicitly stated that the issue of the validity of the original waiver was not before the court. *Id.* at 837. In *American Methyl*, the EPA conceded that it could not revoke a waiver under section 211(f)(4) if correctly granted, but argued that it could revoke a waiver under section 211(f)(4) if, upon

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[21] We note that even if Americal Methyl's blend did contain the maximum concentrations permitted by the waiver, its emissions data standing alone would have counseled denial of the waiver. When the Deteriorated Emissions Test was applied to the data submitted on the eight vehicles tested by American Methyl, Petrocoal failed the test for both tailpipe hydrocarbons and oxides of nitrogen. Characterization Report, J.A. at 240; *see infra* section III-B.

re-examination. the record was found insufficient to support the waiver. *Id.* Accordingly, the EPA asserted that the Petrocoal waiver was not correctly granted initially because the maximum alcohol levels and percentage ratio were not supported in the record.[22] The court determined however, that the EPA's actions and the chronology of events leading up to the proposed revocation demonstrated that the EPA's real impetus for initiating the proposed revocation was new evidence relating to Petrocoal's effect on evaporative emissions of hydrocarbons and not any purported defects in the original waiver. *Id.* The court then went on to characterize the EPA's assertion of deficiencies in the record supporting the original waiver grant as "make-weights' 'and "red herrings." *Id.* at 837-38. Contrary to American Methyl's contention, however, the court characterized the EPA's claims that it sought revocation due to the incorrectness of the original waiver as "make-weights" and "red herrings," not because the claims *per se* lacked merit, but because they lacked merit as purported reasons for the proposed revocation proceeding.

The court's purpose in discussing the relevant issues in *American Methyl* was to demonstrate that since the proposed revocation was motivated by *new evidence*, not *past error*, the revocation would be unwarranted even on

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[22] In its notice soliciting comments on whether to reconsider the Petrocoal waiver, the EPA stated that

> information indicates that the fuel tested by the applicant and provided by the applicant to the Agency and to General Motors Corporation for testing, may not have been the fuel described in the waiver request.

48 Fed. Reg. 19,779, 19,780 (1983). In its notice of proposed revocation, the EPA concluded:

> Thus, the total alcohol, in one case might have reachd 15% but some ambiguity still remains. It appears clear, however, that the highest ratio of methanol to butanol was 4.5 to 1, not 6.5 to 1.

49 Fed. Reg. 11,879, 11,884 (1984).

the EPA's own view of the statute. *Id.* at 838 ("EPA's primary reason for revoking American Methyl's waiver does not relate to a defect in the original grant; thus under the EPA's own interpretation of its powers, a revocation proceeding is not warranted in this case."). This finding was clearly not essential to the court's decision, since the court held that the EPA had no authority to revoke a waiver pursuant to section 211(f) regardless of whether or not the waiver was correctly granted in the first instance. In sum, we find that the dicta in *American Methyl* cited by intervenor American Methyl has no bearing on our evaluation of whether the maximum alcohol levels and percentage ratio specified in the Petrocoal waiver are supported by the record.

B. *Petrocoal Failed the Deteriorated Emissions Test for $NO_x$ Emissions*

Having determined that Petrocoal was expected to have an instantaneous effect on emissions, the EPA analyzed the emissions data on Petrocoal using the Paired Difference Test, the Sign of the Difference Test, and the Deteriorated Emissions Test. *See supra* note 9. All three tests examine the emissions effect of the waiver fuel with respect to the following pollutants: hydrocarbon (HC), carbon monoxide (CO), and oxides of nitrogen ($NO_x$). The EPA reported the test results on the combined data from the eight vehicles tested by American Methyl, the four vehicles tested by GM, and the four vehicles tested by the EPA.

As discussed earlier, the Deteriorated Emissions Test is the test used in lieu of 50,000-mile durability data to determine whether the waiver fuel will cause a vehicle to fail to meet the applicable emission standards over its useful life.[23] *See supra* note 11 (describing test). The

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[23] The EPA further indicates that the Deteriorated Emissions Test is especially useful because it measures the emissions effect of the waiver fuel with respect to each vehicle:

number of vehicles whose projected 50,000-mile emission values exceeded the applicable emission standards using Petrocoal were:

| | |
|---|---|
| HC | 1 out of 16 |
| CO | 1 out of 16 |
| $NO_x$ | 2 out of 16 |

Petrocoal Waiver, 46 Fed. Reg. at 48,978. The Deteriorated Emissions Test is designed to provide a 90 percent probability of failure of the test if 25 percent or more of the vehicle fleet tested would fail to meet emission standards using the waiver fuel or fuel additive. *Id.* For a sample of 16, as here, the failure of two or more vehicles to meet the emission standards constitutes, a failure of the test. *Id.* at 48,979. Thus, Protocoal failed the Deteriorated Emissions Test for $NO_x$ emissions.

The Administrator acknowledged Petrocoal's failure for $NO_x$ emissions but nevertheless granted the waiver stating:

> In this case, Petrocoal just fails (by one vehicle) this Test for $NO_x$. Nevertheless, because the failure was borderline, i.e., small changes to the test criteria would result in a pass, coupled with the small increase in $NO_x$ emissions found in Test 1, I conclude that this problem is not significant enough to warrant a disapproval of the waiver request. In reaching this conclusion, I considered all the information

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It is useful to perform this analysis even if the first two analyses indicate the waiver fuel or fuel additive has no adverse effect. The analysis indicates whether the emissions from any particular type of vehicles or special emission control technologies are uniquely sensitive to the waiver fuel or fuel additive, thus causing vehicles to fail to meet emission standards. This effect could be masked in the previous analyses which consider the emissions results as a group without distinguishing the emissions impact on subgroups.

Petrocoal Waiver, 46 Fed. Reg. at 48,978.

before me including the EEA report submitted by Anafuel.

*Id.* Hence, although the EPA has established specific statistical criteria for determining whether a fuel will cause a vehicle to exceed emission standards, the Administrator determined that it was appropriate to deviate from those criteria and grant a waiver for Petrocoal despite its clear failure of the Deteriorated Emissions Test for $NO_x$ emissions. As far as we know, based on the information supplied by the parties and our own research, the EPA has never before granted a waiver in spite of a fuel's failure to pass the Deteriorated Emissions Test. Indeed, given the straightforward nature of the Deteriorated Emissions Test coupled with the fact that the test itself is conducted in lieu of actual 50,000-mile durability data, based on the *a priori* assumption that the fuel will have only an instantaneous effect, we find it difficult to conceive of any circumstances which would justify deviating from the established criteria.[24] While we do not totally reject the possibility that the Administrator might in some other instance be able to articulate a reasoned explanation for deviating from the established criteria, she certainly has not done so in this case. At oral argument, even the EPA, while arguing that the Administrator could deviate from the established criteria given a reasoned explanation, conceded that the Administrator gave no such reasoned explanation in this case.

The EPA's criteria provide specific cut-off points based on sample size for determining whether a fuel will cause a vehicle to exceed emission standards for each pollutant. The fact that Petrocoal failed for $NO_x$ emissions on the basis of the minimum number of vehicles constituting a failure (*i.e.*, 2 out of 16) and thus "small changes to the

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[24] This is especially true in the present case where at least half the sample of vehicles tested, and possibly all, were not tested on the "worst case" fuel allowed by the waiver. *See supra* p. 26.

test criteria would result in a pass," *id.*, does not in our view provide any reasoned explanation for why this failure—albeit marginal—should not be regarded as a failure. There is no question that if the test criteria were changed, Petrocoal could pass the test. The question is why a special exception should be made to accommodate Petrocoal's failure under the established test criteria. Equally unavailing is the Administrator's notation that the Paired Difference Test indicated only a small increase in $NO_x$ emissions. The point of the Deteriorated Emissions Test is to project, in the absence of actual 50,000-mile durability data indicating the emissions degradation resulting over the vehicle's useful life, whether the identified increase due to the use of Petrocoal will cause the vehicle to exceed emission standards at any point during its useful life. In sum, we find that the Administrator has failed to articulate any plausible reason why the established test criteria do not accurately reflect the emissions effects due to Petrocoal.[25]

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[25] The Administrator further stated that she considered all the information before her including "the EEA Report" submitted by American Methyl. Petrocoal Waiver, 46 Fed. Reg. at 48,978. The "EEA Report" cited is a report prepared for American Methyl by Energy and Environmental Analysis ("EEA"). EEA, utilizing *its own methodology*, concluded that Petrocoal satisfied the waiver conditions related to its impact on tailpipe emissions. *See* Energy and Environmental Analysis, Analysis of Emissions Data from Vehicles Tested with Petrocoal (Sept. 8, 1981), J.A. at 161, 163. In choosing to apply a different statistical test to evaluate the emissions data on Petrocoal, the EEA stated:

> The small sample of cars tested, the variation in baseline fuels and Petrocoal blends used, and the differences in emission control technologies within the sample of cars tested are factors that detract from the significance of EPA's analysis. In addition, EPA's Deteriorated Emissions Test is of questionable validity, since it judges compliance with emission standards by adding the incremental emissions (between vehicles fueled with baseline fuel and Petrocoal) obtained from tests on production cars to emissions prototype certification cars fueled with Indolene. A more statistically and technically valid test is to

The EPA may not grant a section 211(f)(4) waiver unless the applicant has established that the fuel will not cause or contribute to the failure of any emission control device to achieve compliance with emission standards over the useful life of the vehicle. *See supra* p. 11. The EPA's alcohol-gasoline waiver guidelines expressly state: "Where the potential for such harm is evidenced, the applicant has the burden of proving that such harm will not occur." Guidelines for Section 211(f)(4) Waivers for Alcohol-Gasoline Blends, 43 Fed. Reg. at 24,132. Certainly, Petrocoal's failure for $NO_x$ emissions indicates a potential for harmful emission effects absent some reasoned explanation to the contrary. The Administrator may not simply subjectively without a reasoned explanation conclude that a failure of the EPA's established criteria is not significant. Section 211(f)(4) speaks in terms of "a failure" to achieve compliance with the emission standards. We find nothing in the Act or its legislative history to support the Administrator's added gloss that the relevant question is whether the fuel will cause or contribute to a "significant failure." *See* Petrocoal Waiver, 46 Fed. Reg. at 48,977. We conclude that on the record in this case the Administrator acted arbitrarily, capriciously, and abused her discretion in granting the Petrocoal waiver despite Petrocoal's failure of the Deteriorated Emissions Test for $NO_x$ emissions.

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> add *average* incremental emissions for the test fleet to the *average* emissions for equivalent certification cars . . . and check for compliance with the standard.

*Id.* at 163. Whatever the merits of the EEA's conclusions, the Administrator's mere statement that she *considered* the report does not constitute a *reasoned explanation* of what factors or circumstances the Administrator relied on as justification for her deviation from the established criteria in the case of Petrocoal. Indeed, the EEA report may be viewed as casting doubt on the reliability and sufficiency of the emissions data available on Petrocoal as well as questioning the *per se* validity of the EPA's Deteriorated Emissions Test.

C. *Evaporative Emissions*

The petitioners also contend that the Administrator's conclusion that the increased evaporative emissions caused by Petrocoal could be controlled by controlling the volatility of the blended fuel was arbitrary and capricious. *See* Brief for WVMA at 45. The Administrator, in the Petrocoal waiver decision, stated that the relationship between fuel volatility characteristics (primarily the Front End Volatility Index (FEVI)) and evaporative emissions had been clearly established for fuels composed entirely of hydrocarbon components and had been demonstrated to apply for fuels containing "some relatively small percentage of the oxgenated hydrocarbons" TBA, MTBE and Oxinal. Petrocoal Waiver, 46 Fed. Reg. at 48,977. Although noting that the data available on Petrocoal at the higher percentages of alcohol was incomplete, the Administrator concluded that the relationship between fuel volatility and evaporative emissions appeared to hold for Petrocoal based on the data in the record with respect to Petrocoal's FEVI and evaporative emissions.

The Administrator in past waiver decisions has consistently relied on the assumption that fuel volatility restrictions will adequately control evaporative emission increases; generally, however, the assumption has been supported by at least some confirmatory test data on the fuel at issue. *See, e.g.*, Oxinal Waiver, 44 Fed. Reg. at 37,076; MTBE Waiver, 44 Fed. Reg. at 12,245; TBA Waiver, 44 Fed. Reg. at 10,532. While we harbor some doubts as to the wisdom of the Administrator's application of this assumption in the specific case of Petrocoal with its higher methanol, total alcohol, and oxygen content, we decline to find the Administrator's action arbitrary and capricious. The data cited by MVMA indicating that controlling volatility will not solve the evaporative emissions problem caused by Petrocoal was submitted as a supplement to MVMA's petition for

administrative reconsideration. *See* Brief for MVMA at 48 & n.38. While this new data may indicate that the Administrator's reliance on the assumed relationship between fuel volatility and evaporative emissions was in error, this evidence was not in the record at the time the waiver was granted, and thus we will not rely on it to undercut the Administrator's conclusions on review. *See American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1186 n.3 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982).

D. *Materials Compatibility and Driveability*

Finally, petitioners argue that the Administrator erred in concluding that Petrocoal does not present materials compatibility or driveability problems. *See* Brief for MVMA at 49-56. The Administrator observes in the Petrocoal waiver decision that both materials compatibility and driveability are important criteria in evaluating a waiver request. *See* Petrocoal Waiver, 46 Fed. Reg. at 48,977. "Materials incompatibility can contribute or cause the failure of vehicles to meet either their exhaust or evaporative emission standards . . . because a fuel . . . may cause changes in the components in carburetors or fuel systems which exceed the tolerances specified by the manufacturer." *Id.* "Driveability information is important because poor driveability can directly result in increased emissions due to constant misfires and repeated stalling, and possibly lead to tampering with the emission controls of the vehicle." *Id.* The Administrator concluded that based on the information developed in the record that Petrocoal presented neither materials compatibility problems nor significant driveability problems affecting emissions.

Since we have already found on the basis of petitioners' other challenges that the Administrator acted arbitrarily, capriciously, and abused her discretion in granting the Petrocoal waiver, we find it unnecessary to determine expressly whether the Administrator also

acted arbitrarily and capriciously in concluding that Petrocoal resulted in no significant materials compatibility or driveability problems.[26] We are compelled, however, to express our doubts about the adequacy of the Administrator's findings with respect to materials compatibility problems. The EPA, itself, has recognized that materials compatibility is a particularly salient concern with methanol blends. *See supra* p. 21. Yet, the record data on materials compatibility problems associated with Petrocoal is rendered suspect by the lack of any unequivocal evidence that the effects of the "worst case" fuel allowed by the waiver were ever tested. *See supra* p. 26. Nor do we find the mere presence in Petrocoal of a proprietary inhibitor, which purportedly inhibits materials compatibility problems, a sufficient basis for concluding that materials compatibility will not be a problem in the absence of data supporting the actual effectiveness of the inhibitor.[27]

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[26] We likewise find it unnecessary to address petitioners' contentions that the Administrator erred by failing to consider the phase separation problems associated with Petrocoal.

[27] We note that the Administrator's decision does refer to the materials compatibility data submitted by American Methyl. The Administrator states:

> [American Methyl] performed immersion tests on several metallic parts and elastomeric parts commonly found in carburetors and full systems. The results from [American Methyl's] testing indicated that the corrosion of metallic parts due to Petrocoal would be no worse than that of gasoline. The results for the elastomeric parts indicated that while some components changed in characteristics such changes were not significantly different than those with gasoline.

Petrocoal Waiver, 46 Fed. Reg. at 48,977. Comments from GM, however, pointed out not only that it was unclear whether any tests had been run using the "worst case" fuel permitted but also several other shortcomings in the tests. According to GM, American Methyl erred in identifying certain materials used in some fuel system components and conducted all of its tests at room temperature despite the recognized fact that temperature can be a factor in the corrosion of metals. GM Comments, J.A. at 145-46. GM

## IV. Conclusion

For the foregoing reasons, we find that the Administrator acted arbitrarily, capriciously, and abused her discretion in granting the Petrocoal waiver. We have addressed the EPA's and American Methyl's principal arguments in support of the waiver; any arguments not specifically addressed herein were duly considered and found unpersuasive. Accordingly, we vacate the Administrator's decision granting a waiver for Petrocoal, and remand to the EPA for further proceedings consistent with this decision. While we doubt that it is possible for the Administrator to make a reasoned decision to grant the Petrocoal waiver on the basis of the existing record, we, nonetheless, remand to the agency to make this determination.[28] Should the Administrator conclude that the existing record does not contain sufficient data to support a section 211(f)(4) waiver for Petrocoal, American Methyl remains free to rehabilitate the administrative record by reapplying for a waiver with additional data on the emission effects of Petrocoal.

*It is so ordered.*

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conducted its own materials compatibility testing with Petrocoal and concluded:

> These short-term laboratory tests have indicated that Petrocoal should not cause rapid, catastrophic failures of the elastomers which were tested. However, *they do suggest that there is a potential for problems related to the large volume swell of nitrile rubber.*

*Id.* at 144 (emphasis in original). GM further noted that it believed its Petrocoal contained a 2:1 ratio of methanol to butyl alcohols and that a higher ratio "could be more detrimental in certain areas such as evaporative emissions and materials compatability." *Id.* at 147. The Administrator fails to address any of these concerns.

[28] Contrary to American Methyl's contentions, nothing in our decision in *American Methyl* or in section 211(f)(5), 42 U.S.C. § 7545(f)(5), prohibiting a stay of the EPA's action under section 211(f) *pending* judicial review precludes us from remanding this proceeding to the EPA.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1984

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
*Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

AMERICAN METHYL CORPORATION,
*Intervenor*

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No. 81-2279

GENERAL MOTORS CORPORATION,
*Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

AMERICAN METHYL CORPORATION,
*Intervenor*

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[Filed July 26, 1985]

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Petitions for Review of an Order of the Environmental Protection Agency

Before: TAMM, WALD and MIKVA, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the order of the Environmental Protection Agency is vacated and these cases are hereby remanded for further proceedings consistent with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 26, 1985

Opinion for the Court filed by Circuit Judge Wald.

## APPENDIX C

## ENVIRONMENTAL PROTECTION AGENCY

[FRL - ]

### Grant of Application for a Fuel Waiver

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice

SUMMARY: Pursuant to section 211(f) of the Clean Air Act (Act), the Administrator of EPA is conditionally granting the waiver requested by Anafuel Unlimited (Anafuel), for a proprietary fuel known as "Petrocoal" which consists of up to 12 percent, by volume, methanol, up to six percent, by volume, of certain four-carbon alcohols, in the presence of a proprietary inhibitor of not less than 0.023 grams per gallon (gpg) and not more than 0.033 gpg in unleaded gasoline. The waiver is being granted based on the Administrator's determination that Petrocoal will not cause or contribute to a failure of any 1975 or subsequent model year vehicle or engine to comply with the emission standards with respect to which it was certified under section 206 of the Act.

PUBLIC DOCKET: Copies of all public information on this waiver application are available for inspection in public docket EN-81-8 at the Central Docket Section (A-130) of the Environmental Protection Agency, Gallery I-West Tower, 401 M Street, S.W., Washington, D.C. 20460, (202) 755-0245, between the hours of 8:00 a.m. and 4:00 p.m. As provided in 40 C.F.R. Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Chief, Fuels Section, Field Operations and Support Division (EN-397), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 382-2635.

## I. Introduction

Section 211(f)(1) of the Clean Air Act (Act), 42 U.S.C. 7545(f)(1), states that effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar[1] to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act.[2] Section 211(f)(4) of the Act, 42 U.S.C. 7545(f)(4), provides that the Administrator of the EPA, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under section 211(f)(1),[3] if the Administrator determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, or the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 206 of the Act. If the Administrator does not act to grant or deny an application within 180 days of receipt of the application, the waiver authorized by section 211(f)(4) shall be treated as granted.

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[1] The revised definition of "substantially similar" was published in the *Federal Register* on July 28, 1981, 46 Fed. Reg. 38582.

[2] Section 206 of the Act sets forth the certification requirement which vehicle manufacturers must comply with in order to introduce into commerce new model year motor vehicles.

[3] The Administrator may also waive the prohibitions or limitations contained in sections 211(f)(2) and (3).

Anafuel submitted an application for a waiver for a proprietary fuel known as "Petrocoal" on February 20, 1981. A *Federal Register* notice was published April 13, 1981, 46 Fed. Reg. 21695, acknowledging receipt of the application and scliciting comments. The 180-day review period provided by section 211(f)(4), scheduled to expire on August 19, 1981, was initially extended by thirty days until September 18, 1981 with the consent of Anafuel and EPA pursuant to a request from the Office of Management and Budget (OMB) for additional time to review EPA's proposed action under Executive Order 12291 and was subsequently extended an additional ten days until September 28, 1981 by the consent of Anafuel and EPA.[4]

Anafuel stated in its application that Petrocoal consists of up to 12 percent, by volume, methanol, up to 6 percent, by volume, certain four-carbon alcohols in the presence of a proprietary inhibitor of not less than 0.023 grams per gallon (gpg) and not more than 0.033 gpg in unleaded gasoline.[5] The actual C-4 alcohols utilized and the chemical composition of the inhibitor have been made available to EPA but are not publicly available pursuant to the business confidentiality provisions at 40 C.F.R. Part 2.

In making a determination on an application, EPA endeavors to gather as much information as possible about a fuel or fuel additive. Thus, it is preferred that the chemical composition of the fuel or fuel additive be made public allowing other interested parties the opportunity to test and comment on the emissions impact of the fuel or fuel additive. When the applicant has a

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[4] See *Federal Register* notices 46 Fed. Reg. 43082, August 26, 1981, and 46 Fed. Reg. ——, September —, 1981.

[5] Petrocoal as defined in this application is not "substantially similar" to any fuel utilized in certification under section 206 of the Act as that term is defined, *supra*.

legitimate business confidentiality claim, EPA will honor such claim, but insists that the applicant make the fuel or fuel additive available for testing by interested parties subject to appropriate confidentiality agreements.

Anafuel asserted a claim of business confidentiality over the particular C-4 alcohols utilized, the chemical composition of the inhibitor, and the exact formulation respecting the ratio of alcohols and inhibitor in any particular blend of fuel. The procedure for maintaining confidentiality and providing sample test fuel outlined above was followed. Two parties, General Motors and EPA, obtained Petrocoal samples from Anafuel and each conducted a series of tests.

Anafuel supplied test data with its waiver application. Anafuel concluded that that data would demonstrate that Petrocoal would not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 206 of the Act.

## II. Summary of the Decision

I have determined that Anafuel has met the burden established under section 211(f)(4) necessary to obtain a waiver for Petrocoal provided the concentration of methanol in the finished fuel does not exceed 12 percent, by volume, the concentration of total alcohols in the fuel does not exceed 15 percent, by volume, the ratio of methanol to four-carbon alcohols in the finished fuel does not exceed 6.5 to 1, by volume and the finished fuel is blended such that it meets the American Society for Testing and Materials (ASTM) fuel volatility specifications for the area and time of year in which it is sold. In reaching this decision, I have considered all the available information and data including that provided by persons other than the applicant.

III. Method of Review

In order to obtain a waiver for a fuel or fuel additive (hereinafter, fuel or fuel additive will be collectively referred to as "fuel") the applicant must establish that the fuel and its emission products will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 206 of the Act. This burden, which Congress has imposed on the applicant, if interpreted literally, is virtually impossible to meet as it requires the proof of a negative proposition, i.e., that no vehicle will fail to meet emission standards with respect to which it has been certified. Taken literally, it would require the testing of every vehicle. Recognizing that Congress contemplated a workable waiver provision, mitigation of this stringent burden was deemed necessary. For purposes of the waiver provision, EPA has previously indicated that reliable statistical sampling and fleet testing protocols may be used to demonstrate that a fuel under consideration would not cause or contribute to a significant failure of emission standards by vehicles in the national fleet (see, Waiver Decision on Tertiary Butyl Alcohol (TBA), 44 Fed. Reg. 10530 (1979)).

Emission data submitted with respect to a waiver request are analyzed by appropriate statistical methods in order to characterize the effect that a fuel will have on emissions. Which tests are appropriate to characterize the emission effects of a fuel depends on whether the fuel is predicted to have an instantaneous effect or a long-term deteriorative effect on emissions or both. If the fuel is predicted to have only an instantaneous effect, i.e., the fuel causes an instantaneous incremental shift in the emission levels relative to a base fuel and that shift remains constant throughout the useful life

of the vehicle, then "back-to-back" emissions testing will suffice.[6] If, however, a long-term deteriorative effect is predicted, then 50,000-mile durability testing would be required.[7]

The statistical tests applied to emissions data provided with respect to a waiver request for a fuel expected to have an instantaneous emission effect are: a Paired Difference Test, a Sign of Difference Test, and a Deteriorated Emissions Test (a test which compares the deteriorated emissions with the emissions standards in lieu of actually having 50,000-mile emissions data). These statistical tests are described in Appendix A to this decision.

An alternative to providing the amount of data necessary to meet the statistical requirements, is to make judgments based upon a reasonable theory regarding emission effects supported by confirmatory testing. If there exists a reasonable theory which predicts the emission effects of a fuel, an applicant may only need to conduct a sufficient amount of testing to demonstrate the validity of such theory. This theory and confirmatory testing then form the basis from which the Administrator may exercise his judgment on whether the additive will cause or contribute to a significant failure of any emission control devices or system which results in a failure by the vehicle to achieve compliance with emission standards. In addition to emission data, EPA also reviews data on materials compatibility, driveability, fuel com-

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[6] Back-to-back emission testing involves testing a vehicle on a base fuel, then testing that same vehicle on the waiver fuel. The difference in emission levels is attributed to the waiver fuel.

[7] 50,000-mile durability testing involves operating a matched set of vehicles for 50,000 miles and testing each vehicle for its emissions at 5,000-mile intervals. This is essentially the same testing pattern which each automobile manufacturer must do for new motor vehicle certification under section 206 of the Act.

position, and specifications. This information is necessary to fully characterize a fuel, and to determine whether such additive will cause or contribute to a significant failure of vehicles to comply with appropriate emission standards.

Such failure could result from any of the above factors. For example, driveability problems such as lean misfire and repeated stalling lead to increased emissions. Materials compatibility problems could lead to failure of fuel systems which are designed to precise tolerances. Deviations beyond the tolerances could result in greater emissions. Volatility specifications could demonstrate a tendency for high evaporative losses.

*Analysis*

A. Exhaust Emission Data

Experience with other oxygenated hydrocarbon additives similar to the alcohols contained in Petrocoal has led EPA to believe that only an instantaneous emission effect should be observed with Petrocoal.[8] Thus, the emission data were analyzed presuming Petrocoal exhibited only instantaneous emission effects. In reviewing future waiver applications for fuels containing high percentages of methanol without the presence of cosolvents and special inhibitors some long-term durability testing may be required.[9]

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[8] See Waiver Decisions for TBA, 44 Fed. Reg. 10530; MTBE, 44 Fed. Reg. 12242; and Oxinol, 44 Fed. Reg. 37074.

[9] General Motors (GM), in its comments on this application (Docket EN-81-8, Document I-D-6), contends that 50,000-mile durability testing should be required before any waiver could be granted. EPA does not fully embrace this position. This does not mean that in the appropriate circumstances long-term durability testing would not be required. Such a decision would have to be made on a case-by-case basis.

Exhaust emission data were available on 16 vehicles tested on Petrocoal and a base unleaded gasoline.[10] Numerical results of the statistical tests are summarized in Appendix B. The Paired Difference Test (Test 1) and the Sign of Difference Test (Test 2) are used to test the directional effect and the magnitude of the effect which Petrocoal has on emissions and could be used to determine if it contributes to a failure of vehicles to meet emission standards. The Deteriorated Emissions Test (Test 3) is used in lieu of 50,000-mile durability test results and could be used to determine if Petrocoal will cause a failure of vehicles to meet emission standards over their useful life.

The results from the Paired Difference Test (Test 1) and the Sign of Difference Test (Test 2) indicates that exhaust hydrocarbons (HC) do not increase, carbon monoxide (CO) emissions decrease, and oxides of nitrogen (NOx) likely increase, although the amount of the increase is modest. The Deteriorated Emissions Test (Test 3) indicates that there would not be any significant failure of vehicles to meet HC, CO, or NOx standards.

The conclusion of these statistical tests is that Petrocoal reduces CO emissions and has essentially no effect on HC emissions. While it does cause NOx emissions to increase modestly, it is not likely to cause a significant failure of vehicles to meet NOx emission standards (see Appendix B and discussion of the Energy and Environmental Analysis, Inc. (EEA) report).

B. Evaporative Emissions

Anafuel asserted that evaporative emissions are directly related to fuel volatility characteristics, primarily

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[10] For a more detailed list see the Characterization Report—Anafuel Unlimited (Docket. EN-81-8). A fifth vehicle was tested by EPA but was not included in this analysis because the results were not available for public comment and would not have altered the results.

the Front End Volatility Index (FEVI).[11] This relationship has been clearly established when the fuel is composed entirely of hydrocarbon components. It has also been demonstrated to apply when the fuel contains more relatively small percentages of the oxygenated hydrocarbons tertiary butyl alcohol (TBA), methyl tertiary butyl ether (MTBE), and a mixture of TBA and methanol (Oxinol).[12] While the data available on Petrocoal at the higher percentages of alcohols are not complete, the relationship appears to hold also as evidenced by data in the record of Petrocoal's FEVI and the evaporative emission data. Thus, controlling the volatility of Petrocoal within ASTM volatility specifications should adequately control evaporative emissions and they should be no worse than those of commercially available fuels.

It would be discriminatory to require the applicant's fuel to meet a more stringent volatility limit in order to control evaporative emissions than is characteristic of commercially available fuels.[13] The volatility of commercially available gasoline varies over a substantial range, and indeed must be blended with the correct volatility for the particular geographic area and time of year. Therefore, I conclude that Petrocoal will not cause or contribute to the failure of vehicles to meet evaporative emission standards provided it is blended to meet the ASTM volatility specifications appropriate for the area and the time of year as provided in this waiver.

C. Other Technical Issues

1. Materials Compatibility

Materials compatability is an important factor when reviewing a waiver request. Materials incompatibility

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[11] FEVI is equal to the Reid Vapor Pressure (partial pressure at 158° F, ASTM D439-78) plus 0.13 times the numerical percentage of fuel evaporated at 158° F.

[12] See Waiver Decisions for TBA, 44 Fed. Reg. 10530; MTBE, 44 Fed. Reg. 12242; and Oxinol, 44 Fed. Reg. 37074.

[13] See Waiver Decision for Oxinol, 44 Fed. Reg. 37074.

can contribute or cause the failure of vehicles to meet either their exhaust or evaporative emission standards. This can occur because a fuel or additive may cause changes in the components in carburetors or fuel systems which exceed the tolerances specified by the manufacturer. Such changes can impair the performance of the vehicle to the point that emissions are adversely affected. Unfortunately, materials compatibility data are not as easily subjected to quantitative analysis as are emission data.

Anafuel was cognizant of this concern about materials compatibility and added a special corrosion inhibitor to ameliorate these problems. Anafuel also performed testing to demonstrate the lack of materials compatibility problems with Petrocoal.

Anafuel performed immersion tests on several metallic parts and elastomeric parts commonly found in carburetors and fuel systems. The results from Anafuel's testing indicated that the corrosion of metallic parts due to Petroocal would be no worse than that of gasoline. The results for the elastometric parts indicated that while some components changed in characteristics such changes were not significantly different than for those with gasoline.

Based on these data and our judgment, I conclude that Petrocoal containing the methanol and total alcohols specified and in the presence of the proprietary inhibitor in the conditions of this waiver does not present a materials compatibility problem affecting emissions with the fuel systems currently in use.

2. Driveability

Driveability is also an important criterion in judging a waiver application, but is also difficult to objectively quantify. Driveability information is important because poor driveability can directly result in increased emis-

sions due to constant misfires and repeated stalling, and possibly lead to tampering with the emission controls of the vehicle.

The information developed by Anafuel, EPA, and other commenters on driveability, in conjunction with market demands placed on a fuel manufacturer for an acceptable fuel, lead me to conclude that driveability is not a significant problem with Petrocoal.

V. Findings and Conclusion

I have determined that Anafuel has established that Petrocoal will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 206 of the Act.

I am conditioning this waiver to maintenance of a maximum ratio of methanol to four-carbon alcohols of 6.5 to 1.

I hereby grant the waiver requested by Anafuel for its proprietary fuel Petrocoal provided the following conditions are met:

1. The proprietary fuel is blended such that the concentration of methanol in the finished fuel does not exceed 12 percent, by volume, and the concentration of total alcohols in the finished fuel does not exceed 15 percent, by volume; and

2. The proprietary fuel is blended such that the ratio of methanol to the four-carbon alcohols in the finished fuel does not exceed 6.5 to 1, by volume; and

3. The proprietary fuel is blended such that it meets the American Society for Testing and Materials (ASTM) fuel volatility specifications for the area and time of year in which it is marketed; and

4. The proprietary fuel is subject to all of the regulations applicable to unleaded gasoline in Title 40 of the Code of Federal Regulations Parts 79 and 80. This fuel may also be offered at retail in lieu of unleaded gasoline as required by the above regulations.

This action was submitted to the Office of Management and Budget (OMB) for review pursuant to Executive Order 12291. Any comments received from OMB are located in Public Docket EN-81-8.

This action is not a "rule" as defined in 5 U.S.C. 601(2) because EPA is not required to undergo "notice and comment" under section 553(b) of the Administrative Procedure Act, or other law. Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

This is final Agency action of national applicability. Jurisdiction to review this action lies exclusively in the U.S. Court of Appeals for the District of Columbia Circuit. Under section 307(b)(1) of the Clean Air Act judicial review of this action is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of [the date of publication]. Under section 307(b)(2), today's action may not be challenged later in a separate judicial proceeding brought by the Agency to enforce the statutory prohibitions.

9/28/81
Date

By /s/ John W. Hernandez
ANNE M. GORSUCH
Administrator

# APPENDIX A

## STATISTICAL CRITERIA

The following is a brief description of the statistical tests used to characterize the emission effects of a fuel or fuel additive:

(1) The Paired Difference Test

For each vehicle tested on a base fuel and on the waiver fuel or fuel additive, the difference between the waiver fuel or fuel additive emissions and the base fuel emission is calculated. A 90% confidence interval is constructed for the mean differences. If the resulting interval lies entirely below zero it is indicative of no adverse effect from this waiver fuel or fuel additive. If the entire interval is above zero, it is indicative of an adverse effect from the waiver fuel or fuel additive. If the interval contains zero, there is arguably no difference between the base fuel and the waiver fuel or fuel additive with regard to emissions provided the confidence interval is small.

(2) The Sign of Difference Test

For each vehicle tested with a base fuel and the waiver fuel or fuel additive, the sign of the emission difference between the waiver fuel or fuel additive emissions and a base fuel emissions is ascertained. This test is designed to determine whether the number of vehicles demonstrating an increase (+) in emissions with the waiver fuel or fuel additive significantly (at a 90 percent confidence level) exceeded those showing a decrease (—) in emissions with the waiver fuel or fuel additive.

(3) The Deteriorated Emissions Test

For each vehicle, the effect the waiver fuel or fuel additive had no emissions is determined. This incre-

mental effect, either positive or negative, is added to the 50,000-mile certification emission value of the certification emission vehicle which the test vehicle represented. This incremented 50,000-mile emission value is compared to emissions standards to determine if it did or did not exceed the standards. Either a pass or fail is assigned accordingly. The pass/fail results are analyzed using a one-sided sign test.

The first two methods of analysis are designed to determine whether the waiver fuel or fuel additive has an adverse effect on emissions as compared to the base fuel. Each characterizes a different aspect of adverse effect. The Paired Difference Test determines the mean difference in emissions between the base fuel and the waiver fuel or fuel additive. The Sign of Difference Test assesses the number of vehicles indicating an increase or decrease in emissions. The two tests are considered together in evaluating whether an adverse effect exists to assure that a mean difference determination is not unduly influenced by very high or very low emission results from only a few vehicles.

The Deteriorated Emissions Test analysis indicates whether the waiver fuel or fuel additive causes a vehicle to fail to meet emission standards. This test examines each vehicle's emission performance as compared to each pollutant standard. It is useful to perform this analysis even if the first two analyses indicate the waiver fuel or fuel additive has no adverse effect. The analysis indicates whether the emissions from any particular type of vehicles or special emission control technologies are uniquely sensitive to the waiver fuel or fuel additive, thus causing vehicles to fail to meet emission standards. This effect could be masked in the previous analyses which consider the emissions results as a group without distinguishing the emissions impact on subgroups.

## APPENDIX B
## NUMERICAL RESULTS OF THE DATA

The results of the statistical tests described above are summarized here:

(1) *The Paried Difference Test*—The 90 percent confidence intervals around the mean difference between the base fuel and Petrocoal for each pollutant are:

| | |
|---|---|
| Hydrocarbon (HC) | −0.11 to +0.05 |
| Carbon Monoxide (CO) | −2.60 to −0.78 |
| Oxides of Nitrogen ($NO_x$) | +0.01 to +0.16 |

(2) *Sign of Difference Test*—We list the confidence that Petrocoal will cause an increase in emissions over the base fuel based on the observed increases out of the total vehicles tested:

CONFIDENCE OF INCREASE

| | | Percent |
|---|---|---|
| HC | 9 out of 16 | 60 |
| CO | 3 out of 16 | ..... |
| $NO_x$ | 13 out of 16 | 90 |

(3) *Deteriorated Emissions Test*—The number of vehicles whose incremented 50,000-mile emission values exceed applicable standards is:

| | |
|---|---|
| HC | 1 out of 16. |
| CO | 1 out of 16. |
| $NO_x$ | 2 out of 16. |

The statistical Deteriorated Emissions Test is designed to provide a 90 percent probability of failure of the Test if 25 percent or more of the vehicle fleet would fail to meet emission standards using the applicant's fuel or fuel additive. For a 16-vehicle sample, the Test dictates that one vehicle failure constitutes a pass, two or more constitute a failure. In this case, Petrocoal just fails (by one vehicle) this Test for $NO_x$. Nevertheless, because

the failure was borderline, i.e., small changes to the test criteria would result in a pass, coupled with the small increase in $NO_x$ emissions found in Test 1, I conclude that this problem is not significant enough to warrant a disapproval of the waiver request. In reaching this conclusion, I considered all the information before me including the EEA report submitted by Anafuel.

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1984

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*

v.

ENVIRONMENTAL PROTECTION AGENCY
And Consolidated Case No. 81-2279

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[Filed Sept. 18, 1985]

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Before: TAMM, WALD and MIKVA, *Circuit Judges*

### ORDER

Upon consideration of Intervenor American Methyl Corporation's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1984

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*

v.

ENVIRONMENTAL PROTECTION AGENCY
And Consolidated Case No. 81-2279

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[Filed Sept. 18, 1985]

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Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* of intervenor American Methyl Corporation has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1985

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*

v.

ENVIRONMENTAL PROTECTION AGENCY
And Consolidated Case No. 81-2279

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[Filed Oct. 1, 1985]

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Before: WALD and MIKVA, *Circuit Judges*

### ORDER

Upon consideration of the motion of Intervenor American Methyl Corporation to stay issuance of the mandate, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the Court's mandate through October 25, 1985.

*Per Curiam*

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

## APPENDIX G

§ 7545. Regulation of fuels

(a) Authority of Administrator to regulate

The Administrator may by regulation designate any fuel or fuel additive and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive may sell, offer for sale, or introduce into commerce such fuel or additive unless the Administrator has registered such fuel or additive in accordance with subsection (b) of this section.

(b) Registration requirement

(1) For the purpose of registration of fuels and fuel additives, the Administrator shall require—

(A) the manufacturer of any fuel to notify him as to the commercial identifying name and manufacturer of any additive contained in such fuel; the range of concentration of any additive in the fuel; and the purpose-in-use of any such additive; and

(B) the manufacturer of any additive to notify him as to the chemical composition of such additive.

(2) For the purpose of registration of fuels and fuel additives, the Administrator may also require the manufacturer of any fuel or fuel additive—

(A) to conduct tests to determine potential public health effects of such fuel or additive (including, but not limited to, carcinogenic, teratogenic, or mutagenic effects), and

(B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of con-

centration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle or vehicle engine, or the extent to which such emissions affect the public health or welfare.

Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential.

(3) Upon compliance with the provision of this subsection, including assurances that the Administrator will receive changes in the information required, the Administrator shall register such fuel or fuel additive.

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2) (A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 7521 of this title.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish findings with respect to any matter he is required to consider under this paragraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

(3) (A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle or motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles

resulting from the use of any fuel or fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 7607(a) of this title (relating to subpenas) shall be applicable.

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 7543 (a) of this title has at any time been waived under section 7543(b) of this title may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 7410 of this title so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only

if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements.

(d) Penalty

Any person who violates subsection (a) or (f) of this section or the regulations prescribed under subsection (c) of this section or who fails to furnish any information required by the Administrator under subsection (b) of this section shall forfeit and pay to the United States a civil penalty of $10,000 for each and every day of the continuance of such violation, which shall accrue to the United States and be recovered in a civil suit in the name of the United States, brought in the district where such person has his principal office or in any district in which he does business. The Administrator may, upon application therefor, remit or mitigate any forfeiture provided for in this subsection and he shall have authority to determine the facts upon all such applications.

(e) Testing of fuels and fuel additives

(1) Not later than one year after August 7, 1977, and after notice and opportunity for a public hearing, the Administrator shall promulgate regulations which implement the authority under subsection (b)(2)(A) and (B) of this section with respect to each fuel or fuel additive which is registered on the date of promulgation of such regulations and with respect to each fuel or fuel additive for which an application for registration is filed thereafter.

(2) Regulations under subsection (b) of this section to carry out this subsection shall require that the requisite information be provided to the Administrator by each such manufacturer—

(A) prior to registration, in the case of any fuel or fuel additive which is not registered on the date of promulgation of such regulations; or

(B) not later than three years after the date of promulgation of such regulations, in the case of any fuel or fuel additive which is registered on such date.

(3) In promulgating such regulations, the Administrator may—

(A) exempt any small business (as defined in such regulations) from or defer or modify the requirements of, such regulations with respect to any such small business;

(B) provide for cost-sharing with respect to the testing of any fuel or fuel additive which is manufactured or processed by two or more persons or otherwise provide for shared responsibility to meet the requirements of this section without duplication; or

(C) exempt any person from such regulations with respect to a particular fuel or fuel additive upon a finding that any additional testing of such fuel or fuel additive would be duplicative of adequate existing testing.

(f) New fuels and fuel additives

(1) Effective upon March 31, 1977, it shall be unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or fuel additive for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 7525 of this title.

(2) Effective November 30, 1977, it shall be unlawful for any manufacturer of any fuel to introduce into commerce any gasoline which contains a concentration of

manganese in excess of .0625 grams per gallon of fuel, except as otherwise provided pursuant to a waiver under paragraph (4).

(3) Any manufacturer of any fuel or fuel additive which prior to March 31, 1977, and after January 1, 1974, first introduced into commerce or increased the concentration in use of a fuel or fuel additive that would otherwise have been prohibited under paragraph (1) if introduced on or after March 31, 1977 shall, not later than September 15, 1978, cease to distribute such fuel or fuel additive in commerce. During the period beginning 180 days after August 7, 1977, and before September 15, 1978, the Administrator shall prohibit, or restrict the concentration of any fuel additive which he determines will cause or contribute to the failure of an emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified under section 7525 of this title.

(4) The Administrator, upon application of any manufacturer of any fuel or fuel additive, may waive the prohibitions established under paragraph (1) or (3) of this section or the limitation specified in paragraph (2) of this subsection, if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section 7525 of this title. If the Administrator has not

acted to grant or deny an application under this paragraph within one hundred and eighty days of receipt of such application, the waiver authorized by this paragraph shall be treated as granted.

(5) No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

(g) Small refiners

(1) For the purposes of this subsection:

(A) The terms "gasoline" and "refinery" have the meaning provided under regulations of the Administrator promulgated under this section.

(B) The term "small refinery" means a refinery or a portion of refinery producing gasoline—

(i) the gasoline producing capacity of which was in operation or under consideration at any time during the one-year period immediately preceding October 1, 1976, and

(ii) which has a crude oil or bona fide feed stock capacity (as determined by the Administrator) of 50,000 barrels per day or less, and

(iii) which is owned or controlled by a refiner with a total combined crude oil or bona fide feed stock capacity (as determined by the Administrator) of 173,500 barrels per day or less.

(2) No regulations of the Administrator under this section (or any amendment or revision thereof) respecting the control or prohibition of lead additives in gasoline shall require a small refinery prior to October 1, 1982, to reduce the average lead content per gallon of

gasoline refined at such refinery below the applicable amount specified in the table below:

| If the average gasoline production of the small refinery for the immediately preceding calendar year (or, in the case of refineries under construction, half the designed crude oil capacity) was (in barrels per day): | The applicable amount is (in grams per gallon) |
|---|---|
| 5,000 or under | 2.65. |
| 5,001 to 10,000 | 2.15. |
| 10,001 to 15,000 | 1.65. |
| 15,001 to 20,000 | 1.30. |
| 20,001 to 25,000 | .80. |
| 25,001 or over | as prescribed by the Administrator, but not greater than 0.80. |

The Administrator may promulgate such regulations as he deems appropriate with respect to the reduction of the average lead content of gasoline refined by small refineries on and after October 1, 1982, taking into account the experience under the preceding provisions of this paragraph.

(3) Effective on August 7, 1977, the regulations of the Administrator under this section respecting fuel additives (40 CFR part 80) shall be deemed amended to comply with the requirement contained in paragraph (2).

(4) Nothing in this section shall be construed to preempt the right of any State to take action as permitted by subsection (c)(4) of this section.

No. 85-718

FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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AMERICAN METHYL CORPORATION,
*Petitioner,*

v.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 23, 1985

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## QUESTIONS PRESENTED

1. Whether a fuel waiver granted by the Environmental Protection Agency under section 211(f)(4) of the Clean Air Act, 42 U.S.C. § 7545(f)(4), unsupported by any rational explanation of how the fuel concentration limits set forth in the waiver relate to vehicle emissions performance, why the fuel can be presumed to have no effects on emissions over a vehicle's useful life, or why the fuel's failure of the agency's own test criteria should be ignored, may be reversed and vacated upon judicial review?

2. Whether a fuel waiver held to be unlawful by the Court of Appeals may be reversed and vacated upon judicial review pursuant to section 307 of the Clean Air Act, 42 U.S.C. § 7607, without the need for further rulemaking proceedings pursuant to section 211(c) of the Act, 42 U.S.C. 7545(c)?

## PARTIES TO THE PROCEEDINGS

Respondents Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Chrysler Corporation, General Motors Corporation, and Volkswagen of America, Inc. were the petitioners in the Court of Appeals. Respondent in the Court of Appeals was the Environmental Protection Agency (EPA) which issued the final determination reviewed by the Court of Appeals. American Methyl Corporation, petitioner herein, was an intervenor on the side of EPA below. There are no other parties to this case.

Pursuant to Supreme Court Rule 28.1, the Court is advised that the Motor Vehicle Manufacturers Association of the United States, Inc., is an incorporated not-for-profit trade association which has no parent companies, subsidiaries or affiliates. Its members are:

AM General Corporation
American Motors Corporation
Chrysler Corporation
Ford Motor Company
General Motors Corporation
Honda of America Mfg., Inc.
International Harvester Company
M.A.N. Truck & Bus Corporation
PACCAR Inc
Volkswagen of America, Inc.
Volvo North America Corporation

The parent companies and non-wholly owned subsidiaries and affiliates of each member of the Motor Vehicle Manufacturers Association of the United States, Inc. that is a respondent in this case are listed below under the name of the related respondent:

AMERICAN MOTORS CORPORATION
American Motors Financial Corp.
Regie Nationale des Usines Renault

CHRYSLER CORPORATION
Peugeot, S.A. (France)
Mazerati Officini Afairi, S.p.A. (Italy)
Chrysler de Mexico, S.A. (Mexico)
Diamond Star Motors Corp. (U.S.A.)
Mitsubishi Motors Corp. (Japan)

Chrysler Corporation has other non-wholly-owned subsidiaries and unconsolidated subsidiaries which are located in the United States and in foreign countries which number in the hundreds. However, the majority nave the Chrysler name incorporated therein.

GENERAL MOTORS CORPORATION
Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB – Componentes Automotives S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

VOLKSWAGEN OF AMERICA, INC.
Volkswagen AG
Deutsche Automobil G.m.b.H.
AUDI NSU AUTO UNION AG
TAS Tvornica Automobila Sarajevo
WESER-EMS Vertribes G.m.b.H.
Forjaria Sao Bernardo S.A.
Companhia Vale do Rio Cristalino S.A.
InterRent Trucks S.A.
TRIUMPH-ADLER AG
Adlerwerke vorm. Heinrich Kleyer AG
Volkswagen do Brazil, S.A.
Volkswagen Argentina

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-718

AMERICAN METHYL CORPORATION,
*Petitioner,*

v.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Chrysler Corporation, General Motors Corporation and Volkswagen of America, Inc. (collectively "MVMA"), respectfully request the court to deny the petition for a writ of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals is published at 768 F.2d 385 and is reprinted in the Petitioner's Appendix (Pet. App.) A, (Pet. App. 1a).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## STATEMENT OF THE CASE

Section 211(f) of the Clean Air Act[1] prohibits the introduction into commerce of any new motor fuel or fuel additive (collectively referred to as "new fuels") unless it is substantially similar to those used in certifying that a 1975 or later model year vehicle or engine complies with applicable emission standards. Section 211(f)(4) permits the EPA Administrator to waive this prohibition under certain conditions:

> The Administrator, upon application of any manufacturer. . .may waive the prohibitions. . .if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section [206].

Pursuant to its authority to grant waivers to new fuels proven to have no detrimental effects on vehicle emissions, EPA adopted "Guidelines for Section 211(f) Waivers for Alcohol-Gasoline Blends" ("Waiver Guidelines").[2]

Early in 1981, Anafuel Corporation, now American Methyl Corporation, petitioner herein, applied for a section 211(f) waiver for its methanol-gasoline blend known

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[1] 42 U.S.C. § 7545 (f), (Pet. App., 63a). For convenience, references to sections of the Clean Air Act, 42 U.S.C. § 7401 et seq. will refer only to the Public Law section designations. Parallel citations to the United States Code are set forth in the Table of Authorities.

[2] 43 Fed. Reg. 24131, June 2, 1978, reproduced in the appendix to this brief (MVMA App., 2a).

as Petrocoal. Notice of this waiver application was published on April 13, 1981 soliciting public comments on whether Petrocoal met the statutory waiver criteria. Several of the respondents herein filed comments opposing the grant of a waiver.

By mutual consent of EPA and American Methyl, the 180-day review period was twice extended until September 28, 1981 when EPA granted a conditional waiver for Petrocoal. This decision was published in the *Federal Register* on October 5, 1981. 46 Fed. Reg. 48975 (Pet. App. 39a).

On December 4, 1981, within the time provided in section 307(b)(1) for seeking review of nationally applicable final EPA actions under the Clean Air Act, respondents filed a petition for judicial review of the EPA decision to grant a fuel waiver for Petrocoal.[3] At the same time, respondents filed a petition with EPA seeking administrative reconsideration of the waiver decision.

Petitioner American Methyl Corporation promptly intervened as a respondent in the judicial review proceeding. The matter was stayed for almost two years while the parties conducted settlement negotiations. In February of 1983, MVMA supplemented its original petition to EPA with new information relevant to the evaporative emissions effects of Petrocoal. On the basis of this new information, EPA proposed on March 16, 1984 to revoke or modify the Petrocoal waiver.[4] In light of this proposal to reconsider the Petrocoal waiver, all the parties to the judicial review proceeding, including petitioner American Methyl Corporation, joined in a motion to remand the record of the case to EPA so that the agency could take further administrative action with respect to the waiver.

[3] The MVMA petition for judicial review and a separate one filed the same day by General Motors Corporation were consolidated.

[4] Notice of this proposal was published in 49 Fed. Reg. 11879, March 28, 1984.

This motion was granted by the Court of Appeals on April 3, 1984.

One month later, however, American Methyl Corporation requested that EPA rescind its proposed revocation of the Petrocoal waiver on the ground that section 211(f) did not permit EPA to reconsider a waiver decision. When EPA refused to do so, American Methyl filed a petition for expedited review of EPA's decision. The Court of Appeals held that EPA did not have the authority to revoke a fuel waiver pursuant to section 211(f), and could only control or prohibit a fuel "in commerce" after conducting rulemaking pursuant to sesction 211(c). *American Methyl Corp.* v. *EPA,* 749 F. 2d 826 (D.C. Cir. 1984). Accordingly, the court set aside the notices of the agency proceedings proposing to revoke the waiver.

Following the *American Methyl* decision, the Court of Appeals granted MVMA's motion for return of the record on its petition for judicial review of the original waiver decision. Oral arguments were heard on May 14, 1985. At oral argument and earlier in its brief, EPA conceded that the record did not support the waiver decision. On July 26, 1985, Judge Wald, writing for a unanimous three-judge panel, found that the Administrator had acted arbitrarily and capriciously, and had abused her discretion in granting the Petrocoal waiver. Accordingly, the court vacated the Administrator's decision and remanded the matter to EPA for further proceedings consistent with its decision (Pet. App., 1a).[5]

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[5] American Methyl Corporation subsequently filed a motion for rehearing, suggesting that rehearing be *en banc.* This motion was denied September 18, 1985. On September 23, 1985, petitioner also requested the Court of Appeals to stay the issuance of the court's mandate through October 25, 1985, pending filing a petition for a writ of *certiorari.* This motion was granted on October 1, 1985 (Pet. App., 57a) and, upon the filing of the instant petition for *certiorari,* the court deferred issuance of the mandate pursuant to F.R.A.P. Rule 41(b) until final disposition by this Court (MVMA App., 1a).

## REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals, characterized by petitioner as raising an issue of "first impression" (Pet. 20), was properly decided. It does not conflict with either the Clean Air Act or any decision of this or any other court. Moreover, far from establishing any need for definitive guidance from this Court with respect to an important federal question of far-reaching scope and special significance, petitioner's arguments belie a simple, fact-bound dispute.

From the outset, MVMA's member companies have vigorously objected to a fuel waiver for Petrocoal. Judicial review was promptly sought. The Court of Appeals has now determined that the Petrocoal waiver should never have been granted because petitioner failed to establish that Petrocoal met the criteria to qualify for the Clean Air Act waiver. From the time of the waiver decision in 1981 until now, the petitioner has been able to reap the benefits of an unlawful waiver. As a consequence, the EPA waiver decision created the very peril which Congress sought to eliminate when it prohibited introduction of new fuels unless they were shown to have no detrimental effect on vehicle emissions and, correspondingly, on the nation's air quality.

Without in any way ameliorating the defects in the waiver decision delineated by the Court of Appeals, petitioner has attempted to portray the court below as having applied an inappropriate standard of review to the agency decision. Alternatively, petitioner argues that even conceding the invalidity of the waiver, petitioner should be entitled to continue to benefit from EPA's arbitrary and capricious action while the agency conducts yet another rulemaking proceeding, under substantively different statutory criteria than those construed by the Court of Appeals, as if the waiver decision had never been reviewed and vacated.

The court below found three independent bases for concluding that the Administrator's decision was "arbitrary, capricious and an abuse of discretion." American Methyl addresses only one of those grounds in its petition while ignoring the other two, either of which would provide a basis for vacating the waiver decision.

The standard of review applied by the court in its review of the administrative record is well-established and fully consistent with applicable provisions of the Clean Air Act. Having found that the waiver was unlawful, the court properly vacated the agency decision.

## I. THE POWER OF THE COURT OF APPEALS TO REVERSE EPA'S DECISION TO GRANT A FUEL WAIVER FOUND TO BE ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IS WELL ESTABLISHED AND FULLY CONSISTENT WITH APPLICABLE PROVISIONS OF THE CLEAN AIR ACT.

The question presented by petitioner is whether EPA can revoke a fuel waiver without resort to rulemaking under section 211(c) of the Act. That question, and the related discussion set forth in the petition itself (Pet. 11-14), are irrelevant to a review of the decision in this case. Petitioner's formulation of the question completely fails to distinguish between: (1) a case in which EPA, by administrative initiative and without benefit of judicial review, seeks to undo a previous decision to grant a fuel waiver by administrative action; and (2) a case in which a grant of a fuel waiver is held unlawful upon judicial review and is vacated by the court of appeals. In the former situation, it is clear that EPA may control or prohibit a fuel only through a section 211(c) proceeding. Indeed, this was the holding in the *American Methyl* decision, *supra,* more fully discussed in Part III of this brief. However, that is not the situation in this case.

In this case, the Court of Appeals, after reviewing the merits of EPA's decision to grant a fuel waiver for Pet-

rocoal pursuant to section 211(f)(4), found the decision to be arbitrary, capricious and an abuse of discretion. Accordingly, the court vacated the EPA decision.

Under both the Clean Air Act and the Administrative Procedure Act, the reviewing court may properly reverse any action of the Administrator found to be arbitrary.[6] Section 307(d)(9) of the Clean Air Act provides, in relevant part:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

Similarly, the judicial review provision applicable to informal agency action under the Administrative Procedure Act, 5 U.S.C. § 706, states in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *

---

[6] The Court of Appeals considered, but found it unnecessary to decide whether the judicial review provision of the Clean Air Act, section 307(d)(9), or of the Administrative Procedure Act, 5 U.S.C. § 706, governed the standard of review applicable to the waiver decision because the standard (i.e. whether EPA's actions were in excess of statutory authority or arbitrary or capricious) was the same under either Act (Pet. App. 8a, fn 6).

There can be no question that the Court of Appeals had authority to reverse EPA's waiver decision. Yet, petitioner's argument that the only recourse in this case *even if the waiver were properly held unlawful* is further EPA rulemaking pursuant to section 211(c) would render that authority and the judicial review provisions of the Act a nullity.[7] EPA's authority to conduct rulemaking to regulate a fuel pursuant to section 211(c) is independent of the fuel waiver process under section 211(f) since the Agency, upon making the requisite findings set out in section 211(c), may regulate any fuel in commerce at any time, including one which previously received a section 211(f) waiver. Whether such a waiver was lawfully granted or not is completely irrelevant for purposes of section 211(c) rulemaking. Thus, the effect of remanding this case for EPA rulemaking under section 211(c) would be the same whether EPA's waiver decision were reversed or sustained by the court below. There is simply no support for the proposition that the only relief a reviewing court can order is another, substantively different rulemaking proceeding.

The "unambiguously expressed intent of Congress" (Pet. 14) set forth in the judicial review provisions of the Act, far from mandating the anomalous result suggested by petitioner, dictates that EPA waiver decisions be subject to judicial review and be reversed if found arbitrary or capricious. This is what happened in the court below and the result is fully consistent with the Clean Air Act and this Court's decision in *Vermont Yankee Nuclear Power Corp v NRDC,* 435 U.S. 519 (1978). In that case, the Court

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[7] Section 211(c), while related to section 211(f) in that the principal focus is a fuel's effect on air pollution, contains additional substantive criteria for regulation (*e.g.,* cost-benefit analysis of alternative control strategies, section 211(c)(2)(B)) and is procedurally "more cumbersome" than section 211(f). *American Methyl,* 749 F.2d at 840. The full text of section 211 is reproduced in Pet. App. G, 58a *et seq.*

held that when an agency's action "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency]" – but the court should not otherwise intrude into the administrative process. 435 U.S. at 549.

The fact is that the court below followed *Vermont Yankee's* instructions to the letter. Indeed, the court expressly provided the agency another opportunity to make a "reasoned decision" to grant the waiver (Pet. App. 36a) for what was clearly the benefit of petitioner. There is nothing in the Clean Air Act to suggest that a reviewing court can find an agency's decision invalid, but is powerless to reverse or vacate that invalid agency action. Moreover, it is presumptious for the party which stands to benefit from the court's direction on remand to now attempt to use it as a ground for seeking *certiorari*.

## II. THE COURT OF APPEALS APPLIED THE STANDARD APPROPRIATE FOR REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S APPLICATION OF THE FUEL WAIVER CRITERIA UNDER THE CLEAN AIR ACT.

### A. In Making Its Own Independent Judgment as to Whether the Environmental Protection Agency's Concession of Error was Warranted, the Court of Appeals Correctly Declined to Infer the Agency's Reliance on Data Upon Which the Agency Itself Did Not Purport to Rely.

Petitioner's claim that the Court of Appeals disobeyed the "dictates of this Court regarding the scope of judicial review of administrative decisions" (Pet. 17) is baseless. Petitioner does not take issue with the standard of review expressly applied by the Court of Appeals. Rather, petitioner resorts to a fact-bound quarrel with the court's conclusion that the agency's unexplained departure from its general waiver guidelines and reversal of course from

established decisional criteria were arbitrary and capricious. Further review by this Court of the factual record would hardly be justified in any case; in the context of the Petrocoal waiver record's dearth of evidence or argument to support key elements of the EPA decision such review is clearly unwarranted.

The standard of review appropriate for the EPA waiver decision at issue in this case is well-recognized. Whether judicial review is conducted pursuant to provisions of the Clean Air Act or the Administrative Procedure Act[8] the agency action must be reversed if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[9]

This is precisely the standard of review that the court below applied to the EPA's implementation of the fuel waiver provisions in this case (Pet. App. 8a). Moreover, the court agreed with American Methyl Corporation's assertion that it was not bound by EPA's concession of

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[8] As the court below noted, the standard in either case is the same. See note 4, *supra*.

[9] Section 307(d)(9)(A); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 414 (1971), *citing* 5 U.S.C. § 706(2)(A). Accordingly, it is incumbent upon EPA to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'." *Motor Vehicle Mfgrs. Assn. v. State Farm Mut.* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156,168 (1962)). A factual decision made by an Agency is to be subjected by the court to "a thorough, probing, in-depth review" in order to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 416 (1971).

error.[10] However, in making its own independent judgment as to whether EPA's concession was warranted, the Court of Appeals correctly declined to infer that the agency relied on data which EPA did not cite as a consideration in its decision.

> The evidence in the record and the Administrator's decision are simply not of the nature which would warrant this court attributing to the Administrator reasons not even hinted at in the decision.

(Pet. Appl. 24a, n. 20). The Court of Appeals is not required to substitute blind deference to the agency decision for its own review of the factual record, particularly when the agency contravenes its own guidelines for action.[11] EPA's waiver decision did not merely suffer from a lack of "ideal clarity" (Pet. 18), but failed, as the agency conceeded in this case, to explain a number of the most critical factors upon which emissions performance is dependent (Pet. Ap. 23a, n. 19). The agency also failed to explain its departure from prior norms.

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[10] EPA conceded that "the record does not appear to support [the alcohol concentration] limits" and "does not appear to support key elements of the waiver" (Pet. App. 24a).

[11] "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a *presumption* that those policies will be carried out best if the settled rule is adhered to. *From this presumption flows the agency's duty to explain its departure from prior norms." Atchison, Topeka & Santa Fe Ry Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 807-08 (1973) (emphasis added).

B. On The Facts of The Petrocoal Waiver The Court of Appeals Correctly Found EPA's Waiver Decision To Be Arbitrary and Capricious and Properly Vacated The Waiver.

The Court of Appeals found the Petrocoal waiver decision to be arbitrary and capricious for three independent reasons: (1) EPA "lacked any rational basis for concluding that Petrocoal will not cause or contribute to a vehicle's failure to comply with emissions standards over its useful life" (Pet. App. 16a); (2) the record did "not support the maximum limits [of Methanol and other alcohols in the fuel blend] allowed by the waiver" (Pet. App. 26a); and (3) the "Administrator... failed to articulate any plausible reason why the established test criteria do not accurately reflect the emissions effects due to Petrocoal" [to justify disregarding Petrocoal's failure of the test for $NO_x$ emissions] (Pet. App. 31a).[12]

Of these three grounds, petitioner raises a factual dispute only with regard to the last (failure of the test for oxides of nitrogen ($NO_x$) emissions). Petitioner contends that the Court of Appeals' conclusion contradicts the guidelines for review set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 29 (1983), which admit of agency latitude to adapt their rules

[12] The Court of Appeals recognized that the various errors identified in the waiver decision cast doubt on other portions of the record cited in support of the Petrocoal waiver. Thus "...the fact the "worst case" [maximum methanol limits] fuel might not have been tested casts doubt on the confidence we may place in any of the test results on Petrocoal cited to support the waiver decision" (Pet. App. 26a). Similarly, "...even if we accepted the validity of the conclusion [that durability tests were unnecessary], Petrocoal failed – albeit marginally – the Deteriorated Emissions Test performed in lieu of 50,000-mile testing. Under these circumstances, we have no doubt that the EPA abused its discretion in determining that Petrocoal will not cause a vehicle to exceed the emission standards over its useful life." (Pet. App. 16a).

to the demands of changing circumstances (Pet. 15-16). However, as the court below clearly explained, the Administrator acknowledged the failure to meet the $NO_x$ emission requirement with Petrocoal, but serendipitously dismissed the failure as not being a significant one. It was the Administrator's purely subjective evaluation of the degree of failure which led the court to conclude:

> The Administrator may not simply subjectively without a reasoned explanation conclude that a failure of the EPA's established criteria is not significant. Section 211(f)(4) speaks in terms of "a failure" to achieve compliance with the emissions standards. We find nothing in the Act or its legislative history to support the Administrator's added gloss that the relevant question is whether the fuel will cause or contribute to a "significant failure". (Citation omitted). We conclude that on the record in this case the Administrator acted arbitrarily, capriciously, and abused her discretion in granting the Petrocoal waiver despite Petrocoal's failure of the Deteriorated Emissions for $NO_x$ emissions. (Pet. App. 32a).

It is hardly surprising that the court below found EPA's decision with respect to $NO_x$ failures arbitrary. In assessing the emissions effects of Petrocoal, EPA itself selected the test procedure to be applied, defined the pass and fail criteria and, after Petrocoal failed the test, chose to disregard the result despite the fact that the waiver "applicant has the burden of proving that such harm will not occur" (Pet. App. 32a). EPA offered no explanation of "what factors or circumstances the Administrator relied on as justification for her deviation from the established criteria in the case of Petrocoal" (Pet. App. 32a, fn 25).[13]

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[13] In fact, "...even the EPA, while arguing that the Administrator could deviate from the established criteria given a reasoned explanation, conceded that the Administrator gave no such reasoned explanation in this case " (Pet. App. 30a).

C. The Court of Appeals Found Independent Grounds to Hold the Waiver Arbitrary and Capricious In Addition To That Raised in the Petition .

The court below, after examining the factual record, found it lacking to such a degree that it expressed doubt that EPA, on remand, could "make a reasoned decision to grant the Petrocoal waiver" (Pet. App. 36a). As discussed *supra,* the court found two wholly independent reasons for vacating the Administrator's decision in addition to the failure for $NO_x$ emissions discussed in the petition. Petitioner has failed to explain how the outcome of this case would have been any different even if the court below had accepted its arguments with regard to the $NO_x$ failure. Since those additional reasons have not been placed in controversy by the petition, we set forth here only a brief description of these two independent bases for finding that the waiver was unlawful.

The court below recognized that section 211(f)(4) requires that EPA determine that a fuel will not cause or contribute to a failure of an emission device to comply with applicable emission standards during a vehicle's 50,000 mile useful life (Pet. App. 15a). In the absence of actual data showing the presence or absence of such effects, EPA must have a rational basis for determining whether a fuel will comply with this criterion. The only rationale offered by EPA for its conclusion that durability data were unnecessary rested entirely on three of its previous waiver decisions which, the court determined, could "in no way be construed to provide a reasonable basis for the EPA's conclusion that Petrocoal – a fuel containing up to 12 percent methanol – would have only instantaneous, not deteriorative [*i.e.,* changing over time], effects" (Pet. App. 22a).

Similarly, the maximum concentration limits established by the waiver (12 percent methanol, 15 percent total alcohol, Pet. App. 5a) were found to be totally unsup-

ported by any data in the record on the emissions effects of the "worst case" fuel, as even EPA conceded (Pet. App. 24a). In short, the waiver decision fits squarely into circumstances described in *Motor Vehicle Manufacturers Association* cited by petitioner (Pet. 17) in which an agency action would be arbitrary and capricious: the EPA, in subjectively assessing the degree of Petrocoal's failure for $NO_x$ emissions, relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem of the maximum concentration limits, and offered explanations for its decision to forgo testing of the durability (useful life) effects of Petrocoal that ran counter to the evidence before the agency.

## III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ITS EARLIER DECISION IN AMERICAN METHYL

In a final effort to bring this case within the criteria of Rule 17 for *certiorari* review, petitioner contends that the decision of the court below is in "direct conflict" (Pet. 18) with the Court of Appeals' 1984 decision in *American Methyl, supra.*[14] While this purported conflict *within the same* federal circuit may have the distinction of being one of the more novel theories urged as a basis for seeking *certiorari,* it suffers from a fundamental improbity -- there is no conflict between the two decisions.

In the *American Methyl* case, the court considered the authority of EPA to revoke a waiver administratively pursuant to section 211(f) of the Act, "based entirely on new evidence" after the fuel was "in commerce." 749 F.2d at 834. The court held that the EPA Administrator "may not revoke the Petrocoal waiver pursuant to section 211(f), but may forbid the marketing of Petrocoal only pursuant to

[14] This was also the principal argument which petitioner unsuccessfully advanced in seeking *en banc* rehearing in the Court of Appeals.

his [sic] authority to control or prohibit fuel and fuel additives under section 211(c)." 749 F2d at 831. Contrary to petitioner's argument (Pet. 18), the *American Methyl* case did not involve "basically the same issues as were decided in this case for which *certiorari* is sought."

The Court of Appeals considered the following three issues in *American Methyl:* "first, is judicial review appropriate at this stage in the administrative process; second, should American Methyl be estopped from challenging EPA's assertion of revocation authority; and third, does section 211(f) of the Clean Air Act empower EPA to revoke the Petrocoal waiver?" *Id.* These are hardly "basically the same issues that were decided in this case for which certiorari is sought" (Pet. 18).[15]

The lawfulness of the original Petrocoal waiver decision clearly was not an issue before the court in *American Methyl.* This was expressly noted in the following two excerpts from the *American Methyl* opinion:

> ...there is no issue before us as to the original administrative record justifying the Petrocoal waiver...;

and

> ...no issue before us as to the adequacy of the original waiver.

749 F.2d at 837. Additionally, in the opinion authored by Judge Wald who was a member of the panel for both *American Methyl* and the case below, it was expressly stated:

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[15] Petitioner also states that *American Methyl* "involved all of the parties to this case and no others" (Pet. 18). In fact, parties to *American Methyl* who are not parties to the instant litigation included intervenors Automobile Importers of America, Inc. and United American Fuels, Inc.

> In *American Methyl,* this court held that EPA had no inherent authority to reconsider or revoke a waiver under section 211(f)(4) but must instead proceed to prohibit or regulate the fuel under section 211(c). *American Methyl,* 749 F2d at 831. The court explicitly stated that the issue of the original waiver was not before the court. *Id.* at 837.

(Pet. App. 26a).

The American Methyl petition also suggests that the earlier case disposed of arguments relating to the proposed grounds for revocation examined by the court below in its judicial review of the original waiver decision, by characterizing them as "make-weights" and "red herrings" (Pet. 19). However, such an argument completely ignores the context of those characterizations in *American Methyl.* The court's reason for discussing these issues in the earlier case was to demonstrate that EPA's principal motivation in proposing to revoke the waiver was "new evidence" relating to hydrocarbon evaporative emissions, and not a deficiency in the agency's original waiver decision. This is clear from the following language from the opinion of the case below:

> The [*American Methyl*] court determined, however, that the EPA's actions and the chronology of events leading up to the proposed revocation was new evidence relating to Petrocoal's effect on evaporative emissions of hydrocarbons and not any purported defects in the original waiver. Id. The court then went on to characterize the EPA's assertion of deficiencies in the record supporting the original waiver grant as "make-weights" and "red herrings". Id. at 837-38. Contrary to American Methyl's contention, however, the court characterized the EPA's claims that it sought revocation due to the incorrectness of the original waiver as "make-weights" and "red herrings", not because the claims per se lacked merit, but because they lacked merit as purported reasons for the proposed revocation proceeding (Pet. App. 27a).

Therefore, the court's consideration of these factors in the judicial review of the original waiver is not in conflict with their characterization as "make-weights" and "red herring" arguments in the context of the *American Methyl* case.

In conclusion, the decision below is not in any way in conflict with the same court's prior decision in *American Methyl.* It is also consistent with the policy arguments cited by petitioner (Pet. 20). The power of the Court of Appeals to review and reverse unlawful action of EPA is fundamental to the implementation of the goals of the Clean Air Act and "comports with basic fairness" to fuel manufacturers (Pet. 20). MVMA's petition for judicial review was filed within 60 days of publication of the Petrocoal waiver decision. Petitioner American Methyl Corporation became a party to the case at its earliest stage and participated in all the developments leading to the resolution of this case by the court below.

This is not, then, a case wherein a fuel manufacturer is charged with knowing "ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment" (Pet. 20). The risk assumed by petitioner is that of any applicant for a fuel waiver and petitioner has no basis to claim a vested right to an unlawful agency decision, especially when that decision might have grave consequences to the nation's air quality and can result in damage to vehicles.

The real issue in this case was whether EPA's decision to grant a fuel waiver for Petrocoal was arbitrary, capricious, or an abuse of discretion. As this court has often repeated, that kind of fact-based inquiry is one which "Congress has placed in the keeping of the Courts of Appeals," and in which "[t]his Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobile Oil Corp. v. FPC,* 417 U.S. at 310. See

*American Textile Mfrs. Inst. v. Donovan,* 425 U.S. 490 (1981); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951). As the foregoing analysis of the facts actually before the Court of Appeals has made manifest, this is not that kind of case.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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December 23, 1985

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1985

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
*Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent*

AMERICAN METHYL CORPORATION,
*Intervenor*

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*AND CONSOLIDATED CASE NO. 81-2279*

### ORDER

On October 1, 1985, this Court entered an order withholding issuance of its mandate herein "through October 25, 1985". Thereafter, by order entered October 28, a motion previously filed by intervenor American Methyl Corporation, requesting a further stay of mandate, was denied. The Clerk has been informed orally by the Office of the Clerk of the Supreme Court of the United States that on October 25, 1985, intervenor American Methyl Corporation filed a petition for a writ of certiorari. It is expected

that written confirmation will follow. Accordingly, it appears that there has been substantial compliance by intervenor American Methyl Corporation with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. Upon consideration of the foregoing, it is

ORDERED, that the Clerk shall defer issuance of the mandate in accordance with the requirements of Rule 41 (b), Federal Rules of Appellate Procedure.

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed October 31, 1985]

## APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY

[FRL-904-6]

OFFICE OF ENFORCEMENT

Guidelines for Section 211 (f) Waivers for Alcohol-Gasoline Blends

AGENCY: Environmental Protection Agency

ACTION: Notice

SUMMARY: The Clean Air Act Amendments of 1977 added section 211(f), which prohibits or limits the use of certain fuels and fuel additives, including alcohol-gasoline blends. Section 211(f) also provides for waivers of these prohibitions and limitations if a fuel or fuel additive manufacturer can show that a fuel or fuel additive will not cause or contribute to the failure of any emission control device or system installed on vehicles or engines to achieve compliance with applicable emission standards.

Pursuant to section 211(f), the Administrator has 180 days after receipt of an application within which to grant or deny a waiver. If the Administrator does not act within 180 days, the application for waiver shall be treated as granted.

These Guidelines are being published in order to facilitate waiver application and review for alcohol-gasoline blends, in particular Gasohol. The Guidelines also establish procedures for the waiver process.

FOR FURTHER INFORMATION CONTACT: George Y. Sugiyama, Attorney-Advisor, Mobile Source Enforcement Division (EN-340), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, 202-755-2848.

SUPPLEMENTARY INFORMATION: Guidelines: Section 211(f)(4) Waivers

I. Applications for Waivers and Burden of Proof

All requests for a waiver, the supporting data, and the contents of all related submittals should be public information and therefore releasable to any party requesting such data. Should an applicant for a waiver desire to assert a claim of business confidentiality or trade secret information over any part of an application requesting a waiver, such assertion should only be made if the failure to submit such information would seriously jeopardize the success of the application and the release of such information will cause significant harm to the applicant.

Applications for waivers should be submitted only by manufacturers of fuels or fuel additives. Requests for waivers by individuals or organizations who are not manufacturers will not be considered a sufficient request for waiver such as to initiate the 180 day review period provided by section 211(f)(4). For purposes of initiating the 180 day requirement, an application will be considered to be received on the date it is delivered to the Director, Mobile Source Enforcement Division. Use of certified (return receipt) or registered mail is encouraged.

The Administrator may waive the section 211(f) prohibitions and restrictions if he "determines that the *applicant has established*" (emphasis supplied) that the fuel additive in question will not cause the effects described in section 211(f)(4). The burden of performing tests and furnishing data and evidence is upon the applicant. Applications which are not accompanied by any evidence as to the effects of a fuel additive upon the emissions performance of the national automobile fleet will be denied. Any waiver granted to one manufacturer will be applicable to any manufacturer similarly situated. Multiple applications for the same waiver are not necessary and are discouraged unless based on different or additional information.

II. Definitions

A. Substantially Similar

A fuel additive is not substantially similar to any fuel additive used in the certification of any model year 1975 or subsequent model year vehicle or engine under section 206 of the Clean Air Act (as amended), if:

(a) Such fuel additive contains any element other than an impurity which was not specified for use, or was not typically contained, in the fuel utilized in the certification of any model year 1975, or subsequent model year vehicle or engine, or

(b) The chemical structure of the additive is not identical to the chemical structure of any additive specified for use in the certification of any model year 1975, or subsequent model year vehicle or engine.

B. Introduction Into Commerce

Introduction into commerce of a fuel additive occurs when with regard to a quantity of fuel containing such additive:

(a) No further blending, mixing, or other treatment or change to the chemical composition of the fuel will occur, and

(b) The fuel has entered into the process of shipment, such as pipeline or common carrier (whether or not owned or controlled by the manufacturer), with the purpose of selling or offering for sale.

C. Increase in Concentration

The phrase "increase in concentration" is applicable on a per refiner basis and, with respect to fuel additives, will be considered to occur if any concentration in any gallon of fuel (in grams of additive per gallon) exceeds any preceeding concentration for a fuel entered into commerce.

## III. Testing Procedures

A request for a waiver should contain data relating to a fuel additive's emissions effects which are derived from vehicle testing. It is essential that test data provide a reliable basis for comparison with the conditions under which vehicles are certified pursuant to section 206 of the Clean Air Act. The various tests and conditions under which tests should be conducted are described below.

### A. Use of the FTP for Exhaust Emissions Testing

For all tailpipe tests the Federal Test Procedure for 1978 and subsequent year light-duty vehicles should be used. The FTP is described at 40 CFR 86.101 et seq. Any deviations from the FTP should be reported in the application for waiver along with an explanation as to the reasons for such deviations.

### B. Federal Durability Schedule

EPA has reason to believe that any alcohol-gasoline blended fuels effects which may cause or contribute to the failure of a vehicle or engine to meet emission standards will be concentration and/or time dependent. Due to this dependence, such effects may not appear during the relatively short period (3 to 4 months) over which mileage is accumulated utilizing the 50,000 mile Federal Durability Schedule (40 CFR Part 86 Appendix IV).

EPA requests information on any time and concentration dependent effects that alcohol-gasoline blends may have on automotive systems such as gaskets or othe parts of fuel systems, both metallic and nonmetallic. Further, any testing procedures which are used to determine such effects should be described in detail.

Should an applicant for a waiver choose to obtain mileage accumulation data, any deviations from the Federal Durability Schedule should be reported in the application for waiver along with an explanation of the reasons for such deviations.

C. Testing at Various Concentration Levels of Fuel Additives

Where a waiver is sought for a fuel additive, the additive's effects upon emissions performance may be critically dependent upon its concentration in use. Data submitted should encompass the range of concentrations intended for use. No attempt by EPA to extrapolate data to a permissible concentration level is contemplated.

IV. Fuel and Fuel Additive Specifications

A. Mileage Accumulation Fuel

The fuel utilized for mileage accumulation should be similar to that utilized in the certification of light-duty motor vehicles under section 206 of the Clean Air Act except with regard to the application additive. Reference should be made to 40 CFR 86.113-79(a)(2) for an example of one such fuel. Specifications for the mileage accumulation fuel should be reported in the application for a waiver along with documentation that the fuel utilized did not vary in specifications.

B. Emission Test Fuel

All emission testing should be performed using Indolene fuel except with regard to the application additive. If Indolene fuel is not used, then it is recommended that the specifications for emission test fuel contained at 40 CFR 86.113-79(a)(1) be followed. Specifications for the emission test fuel used should be reported in the application for a waiver along with documentation demonstrating that the fuel utilized did not vary in specifications.

V. Durability of Emission Control Systems and Devices

A waiver cannot be granted if a fuel additive will cause or contribute to a failure of any emission control device or system to achieve compliance with the standards over the vehicle's useful life. EPA believes that harm to emission control devices or systems which adversely affects ve-

hicle performance, such that removal or rendering inoperative of such devices or systems may be reasonably expected, should be considered a basis under section 211 (f)(4) for denying a waiver. Where the potential for such harm is evidenced, the applicant has the burden of proving that such harm will not occur.

VI. Formats for Submittal of Information

A. A separate application should be filed for each additive for which a waiver is requested.

B. The application should be in writing, signed by an authorized representative of the applicant, and clearly indicate that it is an application for a waiver pursuant to section 211(f)(4) of the Clean Air Act.

C. All information and data which is used to support a request for a waiver should be submitted at the same time. Substantive amendments (other than technical corrections of information already received by EPA) may be considered to be new applications, and the date such amendments are received may be treated as the beginning of the 180 day period specified in section 211(f)(4).

D. An application filed by more than one party is permissible and will be accepted.

E. The applicant has the burden of furnishing to EPA all data which is referenced or utilized as support for a request for a waiver.

F. Each application will receive a docket number which will be communicated to the applicant(s) along with the receipt date of the application. All correspondence should refer to the docket number.

G. A copy of each application should be submitted to: Director, Mobile Source Enforcement Division (EN-340), Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

H. Each application should contain the following information:

1. Fuel and fuel additive specifications for the mileage accumulation and emissions test fuel and for the fuel and/or fuel additive for which a waiver is requested and the methods of analysis.

2. HC, CO, $NO_x$ emission values in grams/mile for each test performed.

3. Deterioration factors for each vehicle.

4. A description or reference to a description of all procedures used to test each vehicle.

5. A record and description of maintenance and other servicing performed.

6. The results of each emission test for each vehicle and the point in the durability schedule at which such vehicles were tested.

7. A description of each vehicle in the control and test fleets, including a description of their engines, emission control systems, fuel system components, and any auxiliary emission control devices.

8. Results of analysis of the actual fuel used in mileage accumulation and emission testing with respect to additive concentration, lead content, octane rating, sulfur content, phosphorus content, Reid vapor pressure, distillation specifications, and hydrocarbon composition.

9. Evidence of other physical effects of the additive for which waiver is requested on fuel system parts for the 50,000 miles of operation (e.g., indication of corrosion or material incompatibility with the additive).

10. Evidence of the physical effects of the additive for which waiver is requested on catalytic converters for the 50,000 miles of operation (e.g., pressure drop test results or other physical testing to determine extent of catalyst plugging).

Dated: April 24, 1978.

MARVIN B. DURNING,
*Assistant Administrator*
*for Enforcement.*

No. 85-718

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN METHYL CORPORATION, PETITIONER

*v.*

MOTOR VEHICLE MANUFACTURERS ASS'N OF THE UNITED STATES, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in setting aside as arbitrary and capricious a decision by the Administrator of EPA granting a waiver permitting the introduction of a new fuel or fuel additive.

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 768 F.2d 385.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-38a) was entered on July 26, 1985. A timely petition for rehearing was denied on September 18, 1985 (Pet. App. 55a). The petition for a writ of certiorari was filed on October 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In the 1970 Amendments to the Clean Air Act, Congress authorized the Administrator of the Environmental Protection Agency to control or prohibit the manufacture,

introduction into commerce, or sale of any fuel or fuel additive either to protect public health and welfare or to guard against impairment of emission control devices or systems. § 211(c), 42 U.S.C. 7545(c). Before taking action to control or prohibit a fuel or fuel additive in order to protect emission control devices, the Administrator is required to hold a public hearing and consider available scientific and economic data, including a cost-benefit analysis of alternative emissions control systems. § 211(c)(2)(B), 42 U.S.C. 7545(c)(2)(B). The Administrator must conclude that the prohibition will not cause the use of other fuels or additives of equal or greater threat to health or welfare. § 211(c)(2)(C), 42 U.S.C. 7545(c)(2)(C).

In 1977, Congress amended the Clean Air Act to afford the Administrator additional power over the introduction of new fuels or additives that might damage emission control systems. Section 211(f)(1), 42 U.S.C. 7545(f)(1), declared it unlawful, after March 31, 1977, to introduce into commerce a fuel or fuel additive that is not substantially similar to fuels used for emissions testing of prototype vehicles for certification under the Act (see Section 206(a), 42 U.S.C. 7525(a)). Section 211(f)(4) empowered the Administrator to waive this prohibition upon a determination that the applicant for a waiver "has established that such fuel * * * will not cause or contribute to a failure of any emission control device * * * to achieve compliance by the vehicle with the emission standards * * * to which it has been certified." If the Administrator has not acted to grant or deny a waiver within 180 days, the waiver shall be treated as granted. *Ibid.* Section 211(f)(5) provides that no court may stay a waiver granted by the Administrator under Section 211(f)(4) pending judicial review.

2. Petitioner American Methyl Corporation[1] manufactures a proprietary ingredient for use in a motor vehicle fuel called "Petrocoal," which consists of a blend of unleaded gasoline, methanol, and other alcohols. On February 20, 1981, petitioner applied for a Section 211(f)(4) waiver for Petrocoal. On September 28, 1981, EPA granted a conditional waiver for Petrocoal. Pet. App. 39a-54a; 46 Fed. Reg. 48975 (1981).[2] The waiver conditions included, inter alia, limits on the concentrations of methanol and of total alcohols in the finished fuel.

On December 4, 1981, respondents Motor Vehicle Manufacturers Association of the United States (Manufacturers Ass'n) and the General Motors Corporation filed petitions to review the grant of the waiver in the court of appeals. Petitioner intervened as a respondent in those actions. On that same date, the Manufacturers Ass'n also filed a petition for administrative reconsideration of the waiver. Lengthy negotiations between the parties to the administrative and legal proceedings ensued. On February 22, 1983, the Manufacturers Ass'n supplemented its administrative petition with additional technical data concerning evaporative emissions of alcohol-blend fuels such as Petrocoal (Pet. App. 6a). On May 2, 1983, EPA requested public comment on the supplemented administrative petition, 48 Fed. Reg. 19779, and on March 28, 1984, the Administrator published a notice proposing revocation of the Petrocoal waiver, 49 Fed. Reg. 11879.[3] Subsequently, counsel for petitioner

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[1]American Methyl Corporation was previously called Anafuel Unlimited.

[2]Petitioner and EPA had agreed to extend the 180-day deadline (Pet. App. 41a).

[3]In January 1984, in its brief in the court of appeals in the instant case, EPA stated that it had committed at least one fundamental error in granting the waiver on the original record, and it asked the court to remand the case for reconsideration by the agency.

sought and obtained a letter from the General Counsel of EPA, dated June 8, 1984, expressing the opinion that the agency had the authority to reconsider and potentially to revoke the Petrocoal waiver.

3. While the instant case was pending, petitioner filed petitions for review from both the March 28, 1984, notice of proposed revocation and from the June 8, 1984, General Counsel's letter. The court of appeals denied EPA's motion to dismiss these petitions, stayed administrative proceedings, and heard the petitions on a expedited schedule. On December 4, 1984, the court of appeals ruled in favor of petitioner. *American Methyl Corp.* v. *EPA*, 749 F.2d 826 (D.C. Cir.). The court held that, in the circumstances presented, the Administrator was not empowered to revoke a waiver issued pursuant to Section 211(f) of the Clean Air Act, but rather was required to use the rulemaking provisions of Section 211(c) to control or prohibit the fuel that had already been the subject of a waiver. Accordingly, the court of appeals set aside the Administrator's notice proposing to revoke the Petrocoal waiver and remanded the case "for further proceedings under section 211(c), if the Administrator deems them desirable" (749 F.2d at 840).

4. Subsequently, the court of appeals heard the instant case involving the petitions for review challenging the Administrator's original grant of the waiver for Petrocoal. On July 26, 1985, the court granted those petitions for review although it agreed with EPA's position in part (Pet. App. 1a-36a). The court agreed with EPA that the Administrator may grant a waiver if he determines that the use of the fuel or additive does not cause or contribute to the failure of a vehicle to achieve compliance with emissions standards, even if the waiver would result in some increase in emissions (*id.* at 9a-11a). The court further agreed with EPA that actual, long-term durability testing is not always necessary to determine whether use of a fuel or additive would cause a

vehicle to exceed emissions standards over its useful life (five years or 50,000 miles) (*id.* at 11a-16a). The court stated that "[c]lear evidence before the EPA may allow it to conclusively rule out the possibility of long-term deteriorative effects, thus making the EPA's Deteriorated Emissions Test sufficient and obviating the need for actually conducting costly and time-consuming 50,000-mile durability tests" (*id.* at 15a (footnote omitted).

The court granted the petitions for review, however, because it concluded that the Administrator lacked a rational basis for finding that Petrocoal would not contribute to a vehicle's failure to comply with emission standards over its useful life (Pet. App. 16a-32a). First, the court found that EPA's decision not to require 50,000-mile durability testing in this case was not sufficiently supported by any clear evidence that Petrocoal would not have long-term deteriorative effects (*id.* at 16a-23a). Second, the court ruled that the decision to grant a waiver despite the failure of Petrocoal to pass the Deteriorated Emissions Test for nitrogen oxides was not accompanied by a reasoned explanation of why the established test criteria were not determinative (*id.* at 28a-31a). Finally, the court agreed with EPA's concession (see note 3, *supra*; Pet. App. 24a) that the administrative record apparently did not support a finding that the test results actually obtained for Petrocoal were based on fuels meeting the maximum concentration limits specified in the waiver (*id.* at 23a-28a). Accordingly, the court of appeals vacated the Administrator's decision granting the waiver and remanded to the Administrator for renewed consideration of whether a waiver should be granted under Section 211(f) (*id.* at 36a).

## ARGUMENT

The issue addressed in the decision of the court of appeals is whether the administrative record supports the decision reached by the Administrator of the EPA in this case. The

holding that it does not is a factbound one that does not conflict with any decision of another court of appeals or of this Court. Accordingly, there is no reason for review by this Court of the court of appeals' decision remanding this case to the agency for further consideration.

Petitioner's primary claim (Pet. 11-14, 18-21) is that the action of the court of appeals in vacating the Section 211(f) waiver granted for Petrocoal is inconsistent with the earlier court of appeals ruling that the EPA Administrator lacked power to revoke a waiver, *American Methyl Corp.* v. *EPA, supra*. In the earlier case, however, the court found that the Administrator sought to revoke the waiver based on new information submitted two years after the waiver originally had been granted and specifically noted that "the Administrator point[ed] to no defects in his original approval of the Petrocoal waiver" (749 F.2d at 838). In these circumstances, the court found that Congress had intended that the Administrator initiate rulemaking proceedings pursuant to Section 211(c) in order to control or prohibit the fuel. 749 F.2d at 834-840.[4] In the instant case, by contrast, the court of appeals simply exercised its normal function of reviewing administrative action on the record created by the agency. Finding the action of the Administrator here "arbitrary and capricious," it set aside the decision of the Administrator and remanded for further proceedings. See, *e.g., Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).[5]

---

[4]The court there did recognize "an inherent power" of agencies to correct their mistakes by reconsidering decisions within the period for taking an appeal. 749 F.2d at 835. It also suggested that EPA would be able to revoke a waiver obtained by means of fraud or misrepresentation. *Id.* at 834 n.51.

[5]The court of appeals found it unnecessary to decide here whether review lay under the Administrative Procedure Act, 5 U.S.C. 706(2), or under the special provisions for judicial review of the Clean Air Act, 42 U.S.C. 7607(d)(9), because the standards for judicial review are the same. Both provisions embody the arbitrary and capricious standard. See Pet. App. 8a n.6.

Petitioner's claim that the court of appeals lacked power to vacate the decision granting the Section 211(f)(4) waiver boils down to an assertion that waiver actions by the Administrator are unreviewable. This contention is without foundation. There is a presumption of judicial review of final agency action unless Congress either explicitly, or through the statutory scheme it enacted, precludes judicial review. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 5. There is no such preclusion here; rather, Congress clearly intended that rulings on waivers under Section 211(f)(4) would be subject to judicial review. Indeed, Congress directly addressed that subject by modifying the normal incidents of judicial review by precluding the courts from staying a waiver decision pending review. See Section 211(f)(5), 42 U.S.C. 7545(f)(5). In light of Congress's specific attention to this issue, it is plainly inappropriate to infer a greater and different restriction on the normal powers of a reviewing court. Accordingly, the court of appeals was empowered to vacate the waiver decision upon its determination that the Administrator "acted arbitrarily, capriciously, and abused her discretion" (Pet. App. 36a).

There is no inherent inconsistency between the two court of appeals decisions concerning the Petrocoal waiver. One concerns the proper mechanism to be used by the agency itself to revoke a waiver on the basis of new information. The decision here concerns the action to be taken by a reviewing court upon concluding that the original grant of a waiver was arbitrary and capricious. Indeed, the difference in the relief at issue in the respective decisions further shows the lack of any legal inconsistency.

Petitioner also asserts (Pet. 14-18) that the court of appeals' decision is inconsistent with this Court's rulings in *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), and *Vermont*

*Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). Petitioner claims that the court of appeals impermissibly imposed an additional procedural requirement on EPA in finding that the agency acted arbitrarily and capriciously in granting a waiver despite Petrocoal's failure of the Deteriorated Emissions Test for oxides of nitrogen. We do not agree that the court of appeals has imposed any new or additional procedural obligation on the agency. The EPA has used the Deteriorated Emissions Test in considering Section 211(f)(4) waivers in the past, and the court of appeals' decision thus reaffirms the agency's existing procedures. Here, the court of appeals simply found that the agency did not adequately explain its departure from existing criteria when it granted Petrocoal a waiver despite failure of that test (Pet. App. 30a-31a). Compare *Motor Vehicle Manfacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 57 (holding agency abandonment of passive restraint regulations invalid for lack of "reasoned analysis" and adequate explanation).[6]

---

[6]We note that the agency's treatment of Petrocoal's failure of the Deteriorated Emissions Test was only one of several reasons given by the court of appeals for finding the waiver decision arbitrary and capricious (see Pet. App. 16a-28a). Thus, even if this Court were to find that the appellate court overstepped the bounds of judicial review on this particular point, the judgment below would not be altered.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

DAVID C. SHILTON
ANNE S. ALMY
*Attorneys*

DECEMBER 1985

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Supreme Court, U.S.
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No. 85-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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AMERICAN METHYL CORPORATION,
PETITIONER

v.

THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

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## I

The question before this Court goes much deeper than the EPA and the Association have admitted. In fact, they have presented questions which do not even address the real issue. The question is not whether the second panel of the court of appeals erred in its review of an earlier EPA Administrator's waiver of the prohibition to sell petitioner's fuel in commerce. The real question is whether the present Administrator and the

Association can avoid the statutory safeguards of Section 211(c) and have a fuel removed from commerce under the guise of a ruling that the waiver should not have been granted in the first place. It must be understood that the sole purpose of this case from the beginning has been to remove petitioner's fuel from commerce without petitioner having had the protection and the safeguards of a Section 211(c) proceeding.

The first panel of the court of appeals held that once a fuel has been introduced into commerce the sole means for its control or prohibition is by the procedure set forth in Section 211(c). American Methyl Corp. v. E.P.A., 749 F.2d 826, 831, 836 (D.C. Cir. 1984):

> We hold that the Administrator may not revoke the Petrocoal waiver pursuant to Section 211(f), but may forbid the marketing of Petrocoal only pursuant to his authority to control or prohibit fuel and fuel additives under Section 211(c).
>
> * * * section 211(f), which does not admit the existence of a revocation procedure, not surprisingly fails to regulate the conduct of such proceedings. If Section 211(f) is construed as EPA would have it, no particular substantive or procedural requirements (apart from whatever procedural minima may be required by the Constitution's due process clause) need be followed.
>
> * * * *

> * * * Thus, while Congress may have wanted the Administrator to correct his mistakes, it provided a mechanism sufficient to this task in section 211(c). It further understood this mechanism as the exclusive means by which he was to correct waivers mistakenly granted by default. We therefore see no need to imply authority under section 211(f) to reconsider waivers granted after due deliberation. What suffices to correct waivers mistakenly granted by default should also suffice to correct the (hopefully) far smaller proportion of waivers mistakenly granted after careful consideration.

The importance of review in the case now before the Court is a matter of life or death to the petitioner because the EPA has informed petitioner's president and at least three of petitioner's customers that upon receipt of the mandate in this case the EPA will not control or prohibit the marketing of Petrocoal in proceedings required by Section 211(c) as mandated in the first panel's decision, but will interpret the second panel's decision as having effectively removed Petrocoal from commerce. The supposed theory for this interpretation is that Petrocoal was never introduced into commerce because the waiver granted by the Administrator in 1981 was vacated by the second panel of the court of appeals in this case in 1985. (Affidavit of Ronald E. Eames attached hereto as Appendix A.)

II

The opposition of the Association and EPA is based upon the erroneous assertion that there is statutory authority for judicial review of the granting of the Petrocoal waiver. The Association asserts that the review was "fully consistent with the applicable provisions of the Clean Air Act." (Br. 5.) The EPA asserts that "Congress fully intended that rulings on waivers under Section 211(f)(4) would be subject to judicial review. (Br. 7.) Such is not the case.

The Clean Air Act contains specific provisions for judicial review of only specified actions of the Administrator. The statutory scheme of the Clean Air Act shows that Congress intended to preclude judicial review of the granting of a waiver.

The provisions and limitations for judicial review of actions under the Clean Air Act are set forth in subsections (b) and (e) of Section 307 (42 U.S.C. § 7607)(b)). Section 307(b) describes various kinds of actions under the different sections of the statute that can be reviewed and is reproduced in full in the Appendix B to this brief.

The judicial review authority with regard to the entire Clean Air Act is in Section 307(b) (42 U.S.C. § 7607(b)). The review authority for actions taken under sections which are not involved in this case are:

> any emission standard or requirement under section 7412;
>
> any standard of performance or requirement under section 7411;
>
> any standard under section 7521;
>
> any determination under section 7521(b)(5).

However, the review authority with regard to actions taken under Section 211 (42 U.S.C. § 7545) is limited to "any control or prohibition." The pertinent language is as follows:

> (b) Judicial review
>
> (1) A petition for review of action of the Administrator in promulgating * * * any control or prohibition under section 7545 [Section 211] of this title * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * *

Although the Administrator's actions under Section 211 include the issuance of waivers (subsection (f)) as well as the imposition of controls and prohibitions (subsection (c)), it is only the controls and prohibitions that are subject to judicial review. Subsection 211(c)

specifically speaks of the "control or prohibition" of fuels in commerce and provides for specific proceedings by the Administrator to accomplish such "control or prohibition." No such language is used in speaking of the waiver of fuel into commerce under subsection 211(f). The granting of a waiver is not a "control or prohibition."

The only place other than Section 307(b) where the words "control" and "prohibition" are used is in Section 211(c) (42 U.S.C. § 7545(c)) which reads in pertinent part as follows:

> (c) Offending fuels and fuel additives; control; prohibition.
>
> (1) The Administrator may * * * control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle * * *.

The words "control" and "prohibition" are also used in subsections 211(c)(2)(A), 211(c)(2)(B) and 211(c)(2)(C). (See Appendix G to the petition.)

It is clear that by the specific language of the judicial review provisions of Section 307(b), Congress confined the judicial review of actions under Section 211 to those of control or prohibition and thereby excluded review of the granting of waivers.

The Solicitor General refers at pages 2 and 7 of the EPA brief to Section 211(f)(5) as the authority for judicial review of waivers. Section 211(f)(5) reads as follows:

> No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

Section 211(f)(5) merely provides that where review is permitted an action of the Administrator may not be stayed pending such review. That section does not include the word "waiver" as would appear from page 2 of the Solicitor General's brief.

To make it clear that no general judicial review authority exists apart from Section 307(b), subsection (e) of Section 307 provides as follows:

> Nothing in this chapter shall be construed to authorize judicial review of regulations or order of the Administrator under this chapter, except as provided in this section.

III

Because of the lack of jurisdiction to review the waiver and the threatened refusal of EPA to comply with Section 211(c) as directed by the decision of the first panel, the need for review of the second panel's decision

is indisputable. In the absence of review, petitioner requests a summary remand with directions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

Dale E. Anderson

Claron C. Spencer

January 3, 1986

# APPENDIX A

## AFFIDAVIT OF RONALD E. EAMES

STATE OF UTAH )
) ss.
COUNTY OF SALT LAKE )

Ronald E. Eames, being first duly sworn, does upon oath state as follows:

1. I am the President of American Methyl Corporation, a Utah Corporation, Petitioner before this Court.

2. After the decision of the Circuit Court of Appeals was rendered in this matter, I was in a meeting held at the offices of Mr. Richard Koslowski, Director of Enforcement for the Federal Environmental Protection Agency, Washington, D.C. There were present at said meeting the following persons:

Richard Koslowski; Ralph Colleli, legal counsel for EPA; James Caldwell; Scott Stone, legal counsel for American Methyl; myself and possibly David Dearing, legal counsel for the Justice Department.

3. In response to a question by myself concerning EPA participation in a test program subsequent to the issuance of the mandate in this case, Richard Koslowski

stated that under no circumstances would Petrocoal be allowed to be sold commercially after the mandate was issued.

4. Ralph Colleli, legal counsel for EPA, stated, in effect, that as far as EPA was concerned, the Court of Appeals had imposed upon EPA the requirement to prohibit the sale of Petrocoal by vacating the waiver.

Dated this 2nd day of January 1986.

Ronald E. Eames

Subscribed and sworn to by Ronald E. Eames before me this 2nd day of January 1986.

Notary Public
Residing in Salt Lake County,
Utah

My commission expires:

11-9-88

# APPENDIX B

Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b)

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d)of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter 1 of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District

of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * * *

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.